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**Private enforcement of EU antitrust rules in light of the U.S. and
Canadian experience: the case for harmonization**

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**PRIVATE ENFORCEMENT OF EU ANTITRUST RULES
IN LIGHT OF THE U.S. AND CANADIAN EXPERIENCE:
THE CASE FOR HARMONIZATION***

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RESUMEN

A. INTRODUCCIÓN

Las normas de defensa de la competencia desempeñan un papel importante en la economía de mercado, al garantizar un cierto nivel de igualdad para los operadores económicos y contribuir a la mejora del bienestar de los consumidores, entre otros aspectos, a través de una mayor variedad o calidad de los productos y servicios a un precio más bajo, puesto que promueven la competencia efectiva y la asignación eficiente de los recursos. Además de lo anterior, en el contexto de la Unión Europea, las normas de defensa de la competencia resultan indispensables para la consecución de un mercado interior efectivo y la integración de las economías europeas.

En la *aplicación* del derecho de defensa de la competencia cabe diferenciar dos vertientes: la aplicación pública y la aplicación privada. Las autoridades de defensa de la competencia tienen generalmente encomendada la *aplicación pública* de las normas de competencia y la persecución de aquellas conductas anticompetitivas que resultan particularmente nocivas para el conjunto de la economía. Con carácter general, las infracciones de las normas de defensa de la competencia dan lugar a la imposición de multas a las empresas infractoras por parte de las autoridades de competencia (o de los tribunales a propuesta de éstas). Sin embargo, en algunos países como Estados Unidos, el Reino Unido e Irlanda cabe la imposición de sanciones penales. Igualmente, determinados ordenamientos permiten la imposición de multas y sanciones disciplinarias a las personas físicas. A modo de ejemplo, en España el artículo 63.2 de la Ley de defensa de la competencia permite imponer una multa de hasta 60.000 Euros a cada uno de los representantes legales de la empresa infractora o a las personas que integran sus órganos directivos que hayan intervenido en el acuerdo o decisión. En el Reino Unido un consejero de una empresa que haya cometido una infracción de las normas de defensa de la competencia puede ser inhabilitado por un tribunal en el supuesto de que su conducta en el ejercicio de su cargo haga que no resulte idóneo para participar en la gestión de una compañía.

Por su parte, la *aplicación privada* de las normas de defensa de la competencia hace referencia a la aplicación de éstas por parte de los tribunales, cuando declaran la nulidad

de los acuerdos anticompetitivos, adoptan órdenes de cesación y conceden indemnizaciones por daños y perjuicios a instancia de las víctimas de tales infracciones. La aplicación privada es por lo general el único modo de compensar a las víctimas de las conductas anticompetitivas, en la medida en que las autoridades responsables de la aplicación de este derecho en su vertiente pública pueden imponer a los infractores multas (y, en algunos casos, sanciones penales y/o disciplinarias) pero, en términos generales, no pueden conceder indemnizaciones por daños a los perjudicados por la infracción.

Estados Unidos ha optado por un modelo de aplicación del derecho de defensa de la competencia basado fundamentalmente (en un 90% aproximadamente), en la aplicación privada de esta normativa. En la Unión Europea, la situación es justamente la contraria: la aplicación de las normas de defensa de la competencia se lleva a cabo fundamentalmente por las autoridades administrativas (de carácter público) y las acciones privadas representan una proporción comparativamente pequeña de dicha aplicación. No obstante, el interés por potenciar la aplicación privada del Derecho de defensa de la competencia en la Unión Europea se ha incrementado y en abril de 2014 el Parlamento europeo adoptó la primera disposición de armonización (la Propuesta de Directiva del Parlamento europeo y del Consejo relativa a determinadas normas por las que se rigen las demandas por daños y perjuicios por infracciones de las disposiciones del Derecho de la competencia de los Estados miembros y de la Unión Europea, en lo sucesivo, la “Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia” o la “Directiva”) que, no obstante, aún requiere la aprobación final del Consejo de Ministros. Dado que Estados Unidos es un país pionero en el ámbito del derecho de defensa de la competencia, con una amplia experiencia en su aplicación, Europa puede aprender de él valiosas lecciones. No obstante, atendiendo al contenido de la Directiva, da la impresión de que el legislador europeo no ha aprovechado esta oportunidad en todo su potencial, como quedará demostrado en la presente tesis.

Las infracciones del derecho de defensa de la competencia causan cada año daños sustanciales a la economía europea. En 2007 se estimó que el coste anual para la economía de los cárteles de fijación de precios y reparto de mercado de alcance europeo ascendería a entre 13.400 y 36.600 millones de euros. Si se añadiese el impacto de los

cárteles nacionales, dicho coste anual se elevaría a entre 25.000 y 69.000 millones de euros, lo que representa el 0,20-0,55% del PIB de la UE en 2011. Debe tenerse presente que esta cifra no incluye los costes derivados de otras infracciones en materia de defensa de la competencia, tales como el abuso de posición de dominio, por lo que el daño total que dichas infracciones generan a la economía es en realidad muy superior. Por este motivo, disuadir de la ejecución de conductas anticompetitivas es un tema crucial, particularmente en el contexto actual, en el que la economía global continúa estando seriamente afectada por la crisis financiera.

Sin embargo, parece que en la actualidad la aplicación de las normas de defensa de la competencia en la Unión Europea no es suficientemente eficaz y que las multas impuestas a los infractores no producen por sí mismas un efecto disuasorio, dado que el número de cárteles (al menos el de cárteles detectados) ha seguido siendo sustancialmente el mismo durante el siglo XXI. La Comisión europea (en lo sucesivo, la “Comisión”) ha tratado de poner remedio a esta situación modificando su política sancionadora y examinando en qué modo la aplicación privada de la normativa europea de defensa de la competencia podría contribuir a desincentivar las infracciones. Ello ha tenido como resultado la adopción de la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia.

Inicialmente, una de las razones que se invocaban para potenciar la aplicación privada era que si las empresas se viesan obligadas no sólo al pago de una multa por el ilícito anticompetitivo, sino también a indemnizar a las víctimas por los daños y perjuicios derivados de éste, el riesgo de tener que enfrentarse a extensas demandas de daños constituiría un primer elemento de disuasión para las empresas a la hora de cometer infracciones. Esto es, una mayor aplicación privada del derecho de defensa de la competencia incrementaría el efecto disuasorio y reforzaría el cumplimiento de esta normativa. Sin embargo, debe advertirse que la reciente Directiva hace hincapié en la función indemnizatoria de la aplicación privada, sin referirse al efecto disuasorio de las acciones por daños y perjuicios, aun cuando cabe sostener que la responsabilidad por daños tendrá al menos un efecto disuasorio indirecto sobre los futuros infractores, si el importe de los daños a satisfacer por éstos es sustancial. La función indemnizatoria de la aplicación privada es importante en la medida en que normalmente es el único modo en que los afectados pueden obtener una indemnización por la pérdida sufrida ya que, por

regla general, la aplicación pública de las normas de defensa de la competencia hace posible el cese la infracción y la imposición de sanciones a los infractores, pero no la concesión de indemnizaciones por los daños y perjuicios sufridos.

La aplicación privada también alivia la carga de las autoridades de defensa de la competencia, que disponen de recursos limitados y persiguen únicamente aquellas conductas consideradas más nocivas para la economía en su conjunto. Su papel es por tanto complementario de la aplicación pública, haciendo posible para los particulares iniciar acciones cuando las autoridades de competencia no pueden o no tienen intención de hacerlo. Ello resulta de especial relevancia en casos de abuso de posición de dominio o restricciones de defensa de la competencia de naturaleza vertical, dado que las autoridades de competencia se muestran menos activas en la persecución de este tipo de infracciones, bien por razones de prioridad, o bien porque no tienen conocimiento de estas prácticas. En consecuencia, sería importante potenciar la aplicación privada, a fin de promover el cumplimiento general de las normas de defensa de la competencia y mejorar el bienestar de los consumidores. Asimismo, como ha puesto de manifiesto la Comisión, una aplicación privada del derecho de defensa de la competencia más intensa contribuiría en último término a garantizar mercados abiertos y competitivos dentro del mercado interior de la Unión Europea, en la medida en que coadyuvaría a asegurar un plano de igualdad para las empresas en la Unión Europea limitando las barreras a la competencia de carácter privado.

B. OBJETIVOS Y ALCANCE

B.1. Objetivos

El principal objetivo de esta tesis es determinar qué medidas serían necesarias para garantizar una aplicación privada eficaz de las normas de defensa de la competencia en la Unión Europea y realizar propuestas sobre su forma de ejecución. En el estado actual de la legislación (*i.e.*, con anterioridad a la trasposición de la Directiva), las normas procesales nacionales en esta materia son muy diversas, y tales divergencias procesales incrementan el riesgo de diferencias de trato y generan inseguridad jurídica, en la medida en que resulta más difícil, tanto para los perjudicados, como para los demandados predecir cuál va a ser el resultado de un proceso. Además, el reducido número de acciones indemnizatorias interpuestas hasta la fecha en la Unión Europea, en

particular por consumidores, sugiere que el sistema actual de aplicación privada no está funcionando de modo satisfactorio. A título de ejemplo, la carga probatoria asociada al ejercicio de acciones por daños es elevada, pero, al mismo tiempo, el acceso a los medios de prueba tiende a ser limitado. Acreditar la infracción de las normas de defensa de la competencia y el nexo causal entre dicha infracción y el daño sufrido es por tanto una tarea muy compleja. Ello parece ser el resultado de normas nacionales, procesales o sustantivas, poco adecuadas en materia de responsabilidad, que no toman en consideración las especificidades propias de las acciones indemnizatorias de defensa de la competencia. Por tanto, es probable que un número considerable de afectados por ilícitos anticompetitivos no perciban indemnización por el daño sufrido y, consecuentemente, que numerosas empresas infractoras retengan los beneficios ilícitamente obtenidos.

Así, el primer objetivo de esta tesis es determinar las normas procesales que deben ser objeto de modificación para subsanar el actual déficit de aplicación privada de las normas de defensa de la competencia. Por tanto, la primera parte de la tesis se dirige al análisis de los obstáculos a la aplicación privada que existen actualmente en la Unión Europea en general y en el Reino Unido, Alemania, Francia, España, Suecia y Finlandia en particular, al objeto de apuntar las diferencias entre estos sistemas e identificar que obstáculos a la aplicación privada deben ser objeto de subsanación para facilitar las acciones indemnizatorias en este campo.

La presente tesis pretende también determinar en qué medida la finalidad de la aplicación privada del derecho de defensa de la competencia ha de ser indemnizar a las víctimas de ilícitos anticompetitivos y disuadir a los infractores de contravenir esta normativa en el futuro. Esa determinación es crucial, en la medida en que la necesidad de potenciar la aplicación y las medidas necesarias para ello dependerán de si el objetivo es únicamente indemnizar a las víctimas o también disuadir a las empresas en relación con futuras infracciones. En este sentido, una cuestión fundamental es la referente a cuál debería ser el equilibrio deseable entre aplicación pública y privada de las normas de defensa de la competencia y, de acuerdo con ello, a cómo asegurar que una mayor aplicación privada no generará efectos negativos sobre la aplicación pública. El segundo objetivo es analizar los recientes instrumentos legislativos europeos dirigidos a potenciar la aplicación privada: la Directiva sobre Acciones de

Indemnización por Daños en materia de Defensa de la Competencia y la Recomendación de la Comisión, de 11 de junio de 2013, sobre los principios comunes aplicables a los mecanismos de recurso colectivo de cesación o de indemnización en los Estados miembros en caso de violación de los derechos reconocidos por el Derecho de la Unión (en lo sucesivo, la “Recomendación sobre Mecanismos de Recurso Colectivo”). El propósito de este análisis es demostrar los defectos y las limitaciones de la reforma y determinar los aspectos adicionales que requerirían de armonización o aproximación legislativa. La presente tesis pretende mostrar que no es probable que la Directiva revolucione las posibilidades de los afectados por un ilícito de obtener una indemnización por los daños y perjuicios sufridos. Por el contrario, los consumidores en particular quedarán a merced de las organizaciones de consumidores (que a menudo sufren problemas de financiación) y, con toda probabilidad, habrán que ejercer sus derechos a través de las denominadas acciones “de seguimiento” o derivadas (*follow-on actions*); esto es, las acciones de indemnización por daños y perjuicios sólo serán realmente posibles una vez que las autoridades de competencia hayan declarado la existencia de una infracción de las normas de defensa de la competencia de la Unión Europea. Las medidas legislativas serán objeto de valoración crítica a la luz de las experiencias en varias jurisdicciones distintas y se formularán sugerencias acerca del modo en que pueden mejorarse.

Dado que la aplicación privada de las normas de defensa de la competencia tiene un papel notablemente más relevante en Estados Unidos y está igualmente aumentando en Canadá, el tercer objetivo de esta tesis es examinar específicamente qué lecciones pueden extraerse de las experiencias norteamericana y canadiense en materia de aplicación privada del derecho de defensa de la competencia. En éste ámbito se hará énfasis en el papel de las demandas colectivas (*class actions*), los pactos de *cuota litis* y la política en materia de acceso a pruebas (*discovery*) a efectos del reforzamiento de la aplicación privada, en la medida en que todas ellas son características distintivas del modelo vigente en los Estados Unidos, así como en Canadá. El objetivo es examinar las experiencias estadounidense y canadiense y determinar qué aspectos de los modelos de aplicación de las normas de defensa de la competencia de estos países funcionan adecuadamente y cuáles son sus deficiencias. Sobre la base de este análisis, la presente tesis tratará, en primer lugar, de establecer si existe la necesidad de introducir en la Unión Europea las demandas colectivas (*class actions*) u otro tipo de herramientas

procesales existentes en los ordenamientos estadounidense y canadiense para potenciar la aplicación privada y, a continuación, de identificar los posibles obstáculos a la introducción de tales mecanismos en la Unión Europea, una vez adaptados a los ordenamientos y tradiciones jurídicas europeos.

El último objetivo de esta tesis doctoral es determinar cuál es el modo óptimo de potenciar la aplicación privada. En este sentido, la última parte de esta tesis se centra en examinar qué aspectos adicionales a los incluidos en la Directiva deben regularse de modo uniforme y cómo debe llevarse a efecto su armonización. Aspectos centrales de esta parte de la investigación son, entre otros, si deben introducirse en la Unión Europea las demandas colectivas y el pacto de *cuota litis*, aspectos que han sido excluidos de la Directiva. Se examinará si es precisa una armonización total o parcial, o si la redacción de normas de buenas prácticas o la adopción de directrices europeas sería un modo más apropiado de potenciar la aplicación privada. Igualmente, es necesario determinar si resulta preferible una armonización sectorial específica, limitada a casos de defensa de la competencia, o una armonización general de las normas procesales civiles. Asimismo, se indicarán los instrumentos legales adecuados para llevar a efecto la armonización y se verificará la existencia de base jurídica para la actuación de la Unión. Por último, se evaluará la viabilidad y los efectos que cabe esperar de la armonización.

En resumen, la presente tesis pretende demostrar que la nueva Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia ha sido una oportunidad perdida de mejorar el acceso a la justicia en los supuestos de infracción del Derecho de defensa de la competencia de la Unión Europea y que las reglas comunes propuestas no serán suficientes para asegurar una aplicación efectiva y uniforme del Derecho de la Unión a las indemnizaciones por infracción de los artículos 101 y 102 TFUE. En particular, la Directiva supondrá una mejora muy leve en cuanto al resarcimiento de los consumidores, las víctimas últimas de los comportamientos anticompetitivos.

B.2. Alcance

Por lo que se refiere al alcance de esta tesis, debe advertirse que ésta se centra en los aspectos jurídicos de la aplicación de las normas de competencia, dado que el presente

trabajo es ante todo una tesis doctoral en derecho. En otras palabras, la tesis no incluye un análisis económico profundo, sino que este tipo de análisis sólo se efectuará en la medida en que resulte indispensable para el desarrollo del argumento en cuestión. Ahora bien, es importante poner de manifiesto que el análisis económico constituye una parte esencial de la aplicación de las normas de defensa de la competencia y es inherente a ellas, en la medida en que la aplicación del Derecho de defensa de la competencia de la UE lleva consigo un análisis fundamentalmente económico de los efectos de las potenciales restricciones anticompetitivas, al objeto de determinar si los efectos positivos o favorables compensan los efectos negativos de la restricción o si, por el contrario, se generan daños para los consumidores. Por otra parte, las infracciones cuyos efectos sobre la economía de la Unión Europea o de los Estados miembros son meramente marginales no son, por lo general, objeto de persecución por parte de las autoridades de defensa de la competencia, aunque *a priori* sí sería posible invocarlas en el marco de acciones privadas ante los juzgados y tribunales nacionales. En consecuencia, el enfoque económico debe tenerse siempre presente al evaluar las posibilidades existentes de interposición de acciones de indemnización por daños en materia de defensa de la competencia, así como las distintas opciones para fortalecer la aplicación privada de las normas de defensa de la competencia de la UE.

La sanción civil de nulidad de los contratos que vulneren las normas de defensa de la competencia de la UE, así como la posibilidad de solicitar órdenes de cesación quedan también fuera del ámbito de esta tesis doctoral, en la medida en que las cuestiones objeto de investigación conciernen a las condiciones para la interposición de acciones indemnizatorias en materia de defensa de la competencia y a cómo proceder para una mejor reparación o resarcimiento de las víctimas de ilícitos anticompetitivos indemnizando a éstas por la pérdida que hayan sufrido como resultado de la infracción.

De igual forma, se excluyen del ámbito de esta tesis las acciones de indemnización por daños derivados de infracciones de las normas de defensa de la competencia declaradas por árbitros, dado que los órganos arbitrales no necesariamente son susceptibles de ser considerados “tribunales” conforme al Derecho de la Unión Europea, aun cuando dicten decisiones en derecho y el laudo sea vinculante para las partes. No obstante, cabe indicar que es necesario un vínculo más estrecho entre el procedimiento arbitral y el sistema judicial ordinario. Es más, el arbitraje es generalmente una forma voluntaria de

dirimir litigios comerciales, salvo que el contrato en cuestión incluya una cláusula que disponga que los potenciales litigios se someterán a arbitraje. Dado el elevado nivel de autonomía de las partes, éstas pueden emplear reglas *ad hoc* u optar por reglas de una institución arbitral que se ajusten a sus necesidades y expectativas. Ello hace más difícil influir en el arbitraje a través de la adopción de disposiciones legales vinculantes. Por otra parte, la legislación sobre arbitraje es competencia de los Estados Miembros, lo que dificulta la determinación de los límites entre, de una parte, el derecho sustantivo de la Unión Europea (incluyendo la legislación de defensa de la competencia) y, de otra, el derecho nacional y el principio de autonomía procesal. Asimismo, resulta incluso más difícil encontrar estadísticas fiables sobre asuntos que se hayan dirimido mediante arbitraje que sobre acciones de indemnización por daños interpuestas ante los juzgados y tribunales nacionales de los Estados miembros, debido a la naturaleza privada de los litigios que se resuelven por arbitraje.

Por último, en cuanto al análisis de los modelos de aplicación privada en los seis Estados miembros seleccionados (*i.e.*, el Reino Unido, Alemania, Francia, España, Suecia y Finlandia), Estados Unidos y Canadá, la presente tesis examinará las características principales de dichos ordenamientos jurídicos, pero no realizará un análisis en profundidad de éstos. El examen se centrará en aquellos aspectos que están directamente relacionados con la materia objeto de la investigación y las hipótesis subyacentes.

B.3. Metodología y fuentes

B.3.1. Metodología

El objetivo de la presente tesis es determinar las imperfecciones del modelo de aplicación privada de la Unión Europea y, acto seguido, proponer soluciones a nivel de la Unión a partir de las experiencias extraídas de la aplicación privada del Derecho de la Competencia en Estados Unidos y Canadá.

Al objeto de analizar el actual estado de la aplicación de las normas de defensa de la competencia de la UE en la esfera privada, el punto de partida de la investigación será la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, aunque el punto de partida original cronológico en el tiempo sería el

Libro Verde y el Libro Blanco de la Comisión sobre Acciones de daños y perjuicios por incumplimiento de las normas comunitarias de defensa de la competencia. El objetivo es realizar un examen de los obstáculos a la aplicación de las normas en la esfera privada en la UE y complementarlo con un análisis de la jurisprudencia de la Unión pertinente, así como con distintos estudios realizados sobre la aplicación privada de las normas de defensa de la competencia y el recurso colectivo encargados por la Comisión. A continuación, se analizará de forma más exhaustiva la situación existente en determinados Estados miembros, concretamente Alemania como representante del ordenamiento jurídico germano, Francia y España como representantes de la familia jurídica romanista, Suecia y Finlandia en nombre de la tradición jurídica nórdica y el Reino Unido como representante del *Common Law* y uno de los países europeos tradicionalmente más cercanos a los ordenamientos jurídicos estadounidense y canadiense.

Se usará una metodología comparativa. El objetivo es identificar de qué tipos de recursos disponen las víctimas de incumplimientos de las normas de defensa de la competencia. En primer lugar, se analizarán la bibliografía y las disposiciones legales pertinentes sobre la materia, así como la jurisprudencia más relevante. A partir de los resultados de dicho análisis, se procederá a comparar de forma crítica las similitudes y diferencias entre los Estados miembros. A continuación, se realizará una introducción a la Directiva sobre Acciones de Indemnización por Daños en Materia de Defensa de la Competencia y a la Recomendación sobre Mecanismos de Recurso Colectivo de la Comisión, cuyo objetivo es, entre otros, el de avanzar en la aplicación privada, para analizarlas con ojo crítico y determinar los defectos y limitaciones de los que adolecen y en qué forma pueden modificarse para tratar de solucionar los problemas que plantea actualmente el modelo de aplicación privada.

Como referencia de modelo óptimo de aplicación privada se basará en el estadounidense y en el canadiense. Se partirá del supuesto de que el modelo de aplicación privada de Estados Unidos, usado en la mayor parte de la aplicación del Derecho de la competencia en dicho país, también tendrá algo que ofrecer al modelo europeo. Habida cuenta de la dilatada y amplia experiencia en la aplicación privada de las normas sobre competencia en los Estados Unidos, cabe pensar que el análisis de la experiencia americana permitirá dilucidar cuáles son las ventajas e inconvenientes de su modelo y los posibles

obstáculos a su introducción en la UE, una vez adaptado a las tradiciones europeas de índole jurídica y cultural. Este análisis se realizará a la luz de la jurisprudencia y de las disposiciones legales de aplicación tanto a escala federal como estatal, aunque dando preponderancia a la legislación federal toda vez que es la que se aplica en todo el país. Solo se procederá a examinar la legislación estatal cuando difiera en medida significativa de la federal.

Canadá tiene, desde la perspectiva europea, un modelo más moderado de aplicación privada que los Estados Unidos. No prevé, por ejemplo, indemnización por el triple de los daños y la mayoría de los casos sobre competencia se deciden por jueces y no por jurados. Por otra parte, las demandas colectivas canadienses se basan, al igual que las estadounidenses, en un modelo de *opt-out* (con exclusión voluntaria), mientras que el derecho de acceso a pruebas de las partes (*discovery*) no es tan amplio como en los Estados Unidos. Como ya se ha dicho, la coexistencia del Derecho Civil y del *Common Law* en Canadá también hace que su ordenamiento jurídico sea interesante desde el punto de vista europeo, dado que en algunos de los Estados Miembros de la UE rige el *Common Law*, lo que hace necesario crear un modelo de aplicación privada que sea compatible con ambas tradiciones jurídicas. Por todo ello, la experiencia canadiense también puede resultar de utilidad. Se pondrá el acento sobre aquellos aspectos que difieren de las características del régimen jurídico estadounidense. Es decir, se toma como referencia el modelo de aplicación de los Estados Unidos, mientras que el canadiense se tiene en cuenta simplemente para complementar el análisis en aquellos casos en que pueda aportar un valor añadido.

Por otra parte, los estudios comparados no deben basarse exclusivamente en normas legislativas, decisiones judiciales, “el Derecho en los libros” y las características generales del comercio, la práctica y la costumbre, sino “*en todo aquello que ayude a configurar la conducta humana en la situación objeto de estudio*”. Es decir, es necesario atender, por ejemplo, a las diferencias culturales, como es el hecho de que los Estados Unidos sean tradicionalmente “más litigiosos”. Además, podría resultar imposible implementar en la UE las alternativas disponibles en los Estados Unidos y Canadá sin la debida adaptación, debido a las diferencias en los procedimientos judiciales o en el contexto social. En particular, al optar por una determinada solución,

siempre deberá tenerse presente el marco de la aplicación privada en la UE a la hora de valorar las consecuencias de la acción elegida.

En esta tesis se proponen medidas concretas que es preciso adoptar para avanzar en la aplicación privada en la UE. En este sentido, se adopta como punto de partida la Directiva sobre Acciones de Indemnización por Daños en Materia de Defensa de la Competencia, para la que se propondrán modificaciones y ampliaciones. La obra entrará a analizar si es necesario armonizar las normas de procedimiento aplicables y los riesgos y ventajas que dicha armonización conllevaría. Se examinan también las alternativas a la armonización, así como sus ventajas e inconvenientes. Por último se expone la forma en que debería implementarse la armonización, concretamente si debería ser una armonización total o parcial de las normas de procedimiento que rigen las acciones por daños derivados de ilícitos de competencia y en qué medida debería adoptarse a través de instrumentos legales de carácter vinculante de la Unión Europea y no de forma voluntaria mediante directrices y mejores prácticas.

B.3.2. Justificación y valor de una comparación legal

A lo largo de la historia, se han venido produciendo trasvases, voluntarios o no, de normas jurídicas de unos países a otros. Con frecuencia los artífices de estos trasvases han sido los legisladores nacionales, aunque los jueces también han buscado inspiración en las reglas e ideas jurídicas de otros territorios para resolver causas o problemas similares para los que no encontraban solución en el ordenamiento interno. Los efectos de estas transferencias de normas jurídicas dependerán, no obstante, del marco histórico, político, social, religioso y cultural, incluida la cultura jurídica, del país de que se trate. Estos trasplantes jurídicos tienden a producirse, además, con las modificaciones que resultan necesarias para impedir su incompatibilidad con las estructuras y preferencias procesales locales.

La comparación entre dos o más ordenamientos jurídicos puede plantear ciertas dificultades por distintos motivos, entre los que cabe mencionar los problemas lingüísticos y terminológicos, las diferencias culturales, la tendencia de los comparatistas a imponer sus propias concepciones y expectativas a los ordenamientos examinados y la exclusión de las reglas extrajurídicas. Sin embargo, estas dificultades

no impiden la posibilidad de aprender de otros países y de inspirarse en reglas o mecanismos jurídicos para mejorar el funcionamiento del ordenamiento interno, toda vez que la forma en que el ordenamiento extranjero regula una determinada cuestión puede resultar tanto o más eficaz para asegurar la aplicación de las normas. Las condiciones para realizar una comparación legal dependen, no obstante, de una serie de factores como son el grado de similitud de los ordenamientos comparados y la disponibilidad de materiales. Cuanto mayor sea la similitud entre los dos ordenamientos comparados, más fácil resultará la comparación.

En cuanto al método para realizar el estudio comparado, resulta útil empezar por describir las normas, conceptos e instituciones o los problemas legales y las soluciones jurídicas aportadas. El ejercicio de comparación debe centrarse en aquellos aspectos de los ordenamientos extranjeros que desempeñan las mismas funciones, es decir, el análisis de la cuestión examinada no debe realizarse sobre la base de conceptos del ordenamiento jurídico nacional, sino centrarse en un problema jurídico concreto. Acto seguido habrá que identificar las diferencias y similitudes y explicar los motivos de las similitudes y diferencias entre los ordenamientos. Especial importancia tiene determinar la forma en que influyen en las decisiones jurídicas y en la interacción de los agentes jurídicos. Para perfilar las posibles respuestas a los problemas, debería efectuarse una comparación entre los distintos enfoques. En este contexto, es importante tener en cuenta el impacto de las posibles diferencias culturales (y factores socioeconómicos) y de cualesquiera otros factores que no sean de índole jurídica (por ejemplo la costumbre local) y que puedan haber influido en la orientación jurídica de los territorios comparados. Al realizar un estudio comparado, es necesario preguntarse si la norma funciona de verdad en la práctica y por qué; ¿hay, por ejemplo, motivos culturales, prácticas económicas o una determinada práctica comercial que expliquen el funcionamiento de las normas? Después, habrá que pasar a analizar, bajo un prisma crítico, los principios jurídicos a la luz de su significado intrínseco y extraer conclusiones en un marco comparativo (con posibles salvedades) y con un comentario crítico. Debería, además, relacionarse con la finalidad original del estudio. La evaluación crítica implica el examen de las distintas soluciones desde una perspectiva nueva y común, con atención sobre la funcionalidad de las soluciones. Finalmente, sería necesario señalar la importancia relativa otorgada a la naturaleza de los ordenamientos examinados, su familia jurídica, su evolución histórica o sociocultural y las posibles

repercusiones de dicha evolución sobre la de la propia norma/solución en comparación con otros regímenes jurídicos.

En lo que respecta, más concretamente, al derecho sobre competencia comparado, no existe una metodología o bibliografía específica que pudiera servir de punto de referencia común para realizar el estudio ni existe tampoco un estándar internacional aplicable al derecho de la competencia. No obstante, Estados Unidos suele constituir un valioso punto de referencia común gracias a su abundante jurisprudencia, que abarca más de un siglo y al hecho de que ésta contenga más material fáctico que otros ordenamientos jurídicos. Por ejemplo, desde finales de los noventa se han venido introduciendo más elementos jurídicos estadounidenses (por ejemplo, un programa de clemencia) en el Derecho de la competencia de la Unión. Esto no significa, sin embargo, que la ley y la jurisprudencia estadounidenses deban aceptarse sin más, antes bien al contrario, deben examinarse más detenidamente y analizarse en el contexto de las condiciones existentes en otros países.

El valor del derecho de la competencia comparado también es cada vez mayor, puesto que contribuye a entender la forma en que se abordan los distintos problemas de aplicación, de ahí su utilidad para determinar la mejor forma de regular la aplicación de las normas de defensa de la competencia. A este respecto, es especialmente importante analizar las decisiones legales atendiendo a factores tales como los textos, intereses, instituciones, comunidades y modelos de pensamiento que han influido en su adopción.

En esta obra, todos los países examinados pertenecen al ordenamiento de Derecho Civil o de *Common Law*, lo que hace que sean especialmente aptas para su comparación, ya que, a pesar de sus diferencias en términos de evolución histórica, organización, etc., ambos siguen las tradiciones occidentales y suelen ofrecer soluciones relativamente parecidas a los mismos problemas jurídicos. Sin embargo, es natural que aun dentro de una misma familia jurídica existan diferencias entre los distintos ordenamientos, por lo que, por ejemplo, resulta procedente realizar un análisis de la aplicación privada tanto en el Reino Unido como en los Estados Unidos a la luz de su respectivo y distinto derecho procesal. También debe tenerse presente que, aparte de EEUU y Canadá, todos los demás países estudiados forman parte del ordenamiento jurídico de la UE, lo que hace que la comparación legal sea especialmente oportuna, ya que todos comparten la

mismas normas sustantivas de competencia y que la obligación de cumplir los principios de equivalencia y eficacia fija el límite respecto a la aplicación de las normas de procedimiento internas.

B.3.3. Presentación de fuentes

Las principales fuentes consultadas para la obra serán tanto la legislación vigente como las propuestas legislativas y la jurisprudencia sobre la aplicación de las normas de competencia en la UE (en particular el Reino Unido, Alemania, Francia, España, Suecia y Finlandia) y en los Estados Unidos y Canadá. En cuanto a las fuentes de la UE, además de la jurisprudencia de la Unión, se prestará particular atención a los documentos oficiales de la Comisión Europea, en particular la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, la Recomendación sobre Mecanismos de Recurso Colectivo, la fallida Propuesta de una Directiva del Consejo sobre normas para regular las acciones de daños y perjuicios por infracciones de los artículos 81 y 82 del Tratado, el Libro Verde y el Libro Blanco sobre acciones de daños y perjuicios por incumplimiento de las normas comunitarias de defensa de la competencia, así como el Documento de Trabajo de la Comisión “Hacia un Enfoque Europeo Coherente para la Reparación Colectiva”. En lo que se refiere a los Estados Unidos, las fuentes principales serán las leyes y jurisprudencia federales, aunque en ocasiones, cuando las diferencias entre el Derecho federal y estatal lo justifiquen, se hará referencia a la jurisprudencia estatal. De igual modo, las principales fuentes de Canadá consisten en las leyes y jurisprudencia federales, teniéndose solo en cuenta las de las provincias canadienses cuando sea de particular relevancia para el objeto de estudio.

Las fuentes secundarias empleadas incluyen libros y artículos sobre doctrina jurídica tanto de la Unión Europea, a escala de la Unión y también nacional, como de los Estados Unidos y Canadá. Los artículos pertenecen, fundamentalmente, a publicaciones especializadas en Derecho de la competencia o mercantil pero, por ejemplo, también se incluyen publicaciones dedicadas al Derecho europeo o al Derecho internacional. La bibliografía incluirá además diversos estudios encargados por la Comisión sobre aplicación particular de las normas de defensa de la competencia y sobre acciones colectivas.

La mayor parte de las fuentes consultadas serán europeas, puesto que la finalidad de la obra es la de proponer una solución para la insuficiente aplicación de las normas de defensa de la competencia de la UE. También se da preferencia a las fuentes de este siglo, puesto que antes la aplicación privada no recibía mucha atención en la UE y recientemente se han implementado importantes reformas de los modelos de aplicación del Derecho de la Competencia a nivel nacional en varios Estados miembros.

C. CONCLUSIONES

C.1. Resumen de las principales conclusiones

C.1.1. Aplicación privada de las normas de derecho de defensa de la competencia de la UE a escala europea

En la Unión Europea, la elección política en relación con la aplicación de las normas europeas de defensa de la competencia ha sido su aplicación pública por las autoridades nacionales y, hasta la modernización de la aplicación de los artículos 101 y 102 TFUE en mayo de 2004, fundamentalmente por la Comisión. El papel de la aplicación privada de dichas normas de competencia, en particular a través del ejercicio de acciones indemnizatorias, ha sido por tanto mucho menos relevante, a pesar de que el Tribunal de Justicia declaró tempranamente, en el asunto *BRT c. SABAM*, que los artículos 101 y 102 TFUE surten efectos directos en las relaciones entre particulares y “*crean directamente derechos en favor de los justiciables que los órganos jurisdiccionales nacionales deben tutelar*”. Hasta la modernización de la normativa de defensa de la competencia, esto podía explicarse en parte porque la Comisión tenía el monopolio de la concesión de exenciones individuales en relación con aquellos acuerdos restrictivos de la competencia conforme al apartado primero del artículo 101 TFUE que cumplieren las condiciones de exención del apartado tercero del mismo precepto legal, lo que tendía a paralizar las acciones privadas pendientes ante los tribunales nacionales, hasta que la Comisión se pronunciase sobre la solicitud de exención. Junto a ello, el Tratado no contiene ninguna disposición expresa en materia de responsabilidad por daños derivados de infracciones de los artículos 101 y 102 TFUE. Este derecho se ha extraído de lo dispuesto en el artículo 4.3 del TUE y del principio de eficacia y, posteriormente,

ha sido expresamente reconocido por el Tribunal de Justicia en un su paradigmática sentencia en el asunto *Courage*.

En *Courage*, el Tribunal de Justicia declaró que cualquier particular podía invocar ante los tribunales nacionales una infracción del artículo 101.1 TFUE y que este derecho se extendía incluso a las partes de un contrato susceptible de restringir o falsear la competencia. Igualmente, el derecho a reclamar daños y perjuicios es independiente de si la Comisión está o no tramitando una eventual denuncia. De este modo, el Tribunal extendió expresamente los principios que facultan para reclamar contra los Estados miembros por infracción del Derecho de la Unión Europea a la responsabilidad por infracción por las empresas de las normas de defensa de la competencia de la UE, al reconocer un derecho de la Unión a la reclamación de daños y perjuicios derivados de ilícitos anticompetitivos, argumentando que ese derecho es necesario para garantizar la plena efectividad de las normas de defensa de la competencia. En otras palabras, creó una responsabilidad individual por infracción de las normas de defensa de la competencia. Asimismo, declaró que los tribunales nacionales están obligados a dar efectividad al derecho reconocido por la Unión a la indemnización por daños, con independencia de las disposiciones nacionales.

La encomienda a los tribunales nacionales de la aplicación de los derechos de la Unión había sido ya confirmado por el Tribunal de Justicia en su sentencia *van Gend & Loos*, en la que puso de manifiesto la naturaleza complementaria de la aplicación pública y privada de los derechos derivados del Derecho de la Unión Europea, y declaró que los particulares también están facultados para participar en la vigilancia del cumplimiento de las obligaciones impuestas por la Unión. Pero la vigilancia por los particulares del cumplimiento de las normas europeas de defensa de la competencia, a través del ejercicio de su derecho, reconocido por la Unión, a la indemnización de daños y perjuicios derivados de infracciones en esta materia no ha funcionado muy satisfactoriamente en la práctica. La escasa aplicación privada de las normas de competencia en la Unión Europea se puso de manifiesto en el Estudio *Ashurst*, en el que se señalaba que la aplicación privada en la Unión Europea presentaba una “*sorprendente diversidad y un total subdesarrollo*” (traducción propia). Aun cuando el número de acciones indemnizatorias recogido en el Estudio *Ashurst* pueda resultar cuestionable, particularmente en lo que se refiere a Alemania, España, Francia, Reino

Unido, Países Bajos, Bélgica, Italia, Portugal y Suecia, a la luz de investigaciones más recientes, el Estudio sí sirve para acreditar el mínimo nivel general de aplicación privada de este Derecho en la Unión Europea hace aproximadamente una década.

Por otra parte, pese a que las acciones privadas de indemnización por daños y perjuicios se interponen con mayor frecuencia en la actualidad, el número de acciones ejercidas en la Unión Europea sigue siendo reducido en términos comparativos. La Comisión ha estimado que, entre 2006 y 2012, se plantearon tan sólo 52 acciones indemnizatorias derivadas de Decisiones de la Comisión (*i.e., follow-on actions*). Es más, dichas reclamaciones se interpusieron únicamente en siete Estados miembros, en su mayor parte en Alemania, el Reino Unido y los Países Bajos. Por el contrario, en el resto de los Estados miembros parecen no haber existido acciones de seguimiento fundadas en Decisiones de la Comisión durante el periodo indicado. Lo anterior indica que las acciones de reclamación de daños y perjuicios no están funcionando de modo adecuado en la gran mayoría de los Estados miembros y que la aplicación privada en la Unión Europea es aún muy diversa, pese a la existencia de un derecho reconocido por la Unión a la indemnización de daños y perjuicios.

Por otra parte, se considera que existen casos adicionales que han sido objeto de transacción extrajudicial. Ahora bien, es posible que los demandantes se encontrasen en una situación más débil que la de los demandados, esto es, que su poder de negociación haya sido o sea reducido, lo que podría dar lugar a acuerdos transaccionales poco ventajosos para ellos, a no ser que puedan disponer de una herramienta judicial efectiva que incentive al demandado a transar. Además, cuando se interponen demandas de indemnización por daños y perjuicios ante los tribunales, las empresas emplean habitualmente las normas de defensa de la competencia como instrumento de defensa en el marco de litigios contractuales de carácter comercial y aparentemente en muchos supuestos se formulan pretensiones distintas de la indemnización de daños, o ésta fracasa.

En particular, las demandas de indemnización por daños apenas son objeto de interposición por parte de consumidores, y las escasas acciones “de representación” (*representative actions*) que hasta la fecha se han ejercido en su nombre han tenido un éxito muy limitado, no habiendo sido objeto de indemnización la mayor parte del daño

sufrido por los perjudicados. Lo anterior resulta preocupante dado que, en último término, las víctimas de las prácticas anticompetitivas son generalmente los consumidores, ya que los compradores en niveles anteriores de la cadena de distribución pueden trasladar el sobrecoste abonado al siguiente nivel, mientras que los consumidores han de asumir la totalidad del sobrecoste que se les traslada.

Esta insuficiente aplicación o invocación de las normas de defensa de la competencia, especialmente por parte de los consumidores, resulta mucho más alarmante a la luz de la modernización de la legislación de defensa de la competencia de la UE, dado que el objetivo de la reforma era, entre otros, fomentar el ejercicio de acciones privadas otorgando a los jueces nacionales competencia para aplicar los artículos 101 y 102 del TFUE en su integridad. El intento de incrementar la aplicación privada podría, de hecho, ser considerado como un paralelismo de la creación de los “fiscales generales privados” (*private attorneys general*) en los Estados Unidos, en virtud del artículo 4 de la ley americana *Clayton Act*.

C.1.2. Obstáculos a la aplicación privada en los Estados miembros

La limitada aplicación privada de las normas de defensa de la competencia puede explicarse por el hecho de que las acciones de indemnización por daños se rigen en la actualidad por las normas procesales nacionales. Esto es, en la práctica, la posibilidad de ejercer acciones indemnizatorias varía de un Estado miembro a otro. El análisis de la aplicación privada en el Reino Unido, Alemania, Francia, España, Suecia y Finlandia que se ha llevado a cabo en esta tesis muestra que los perjudicados aún han de hacer frente a diversos obstáculos para poder ejercer acciones de indemnización por daños en materia de defensa de la competencia en la Unión Europea. Incluso en aquellos Estados miembros en los que las acciones de defensa de la competencia son objeto de ejercicio frecuente, tales como el Reino Unido y Alemania, rara vez se conceden indemnizaciones por daños en casos de cártel. En particular, no parece que los consumidores dispongan de ningún remedio legal eficaz en la Unión Europea, dado que apenas han existido demandas colectivas de consumidores, de pequeña cuantía, relativas a indemnizaciones por daños derivados de infracciones del derecho de defensa de la competencia.

Resulta especialmente sorprendente el hecho de que las víctimas de cárteles no ejerzan acciones indemnizatorias con mayor frecuencia. Es comprensible que este tipo de acciones de reclamación de daños no sean objeto de interposición como acciones independientes, teniendo en cuenta que la detección de estos acuerdos secretos resulta difícil para las propias autoridades de competencia, que disponen de amplios poderes de inspección. En consecuencia, resulta virtualmente imposible para las víctimas de acuerdos de cártel aducir prueba suficiente que acredite la existencia de la infracción y el daño sufrido como resultado de ésta. No obstante, cabría esperar que las acciones derivadas o de “seguimiento” fuesen más frecuentes, particularmente dado que el demandante podría remitirse a la decisión de la Comisión para acreditar la existencia de la infracción. Sin embargo, una explicación al limitado número de acciones derivadas de naturaleza indemnizatoria podría residir en que la decisión por la que se declara la existencia de infracción no necesariamente acredita que la infracción haya causado daños de forma efectiva.

Otra explicación podría ser que muchas de las potenciales acciones indemnizatorias son objeto de transacción. Pero la explicación más plausible es que actualmente existen demasiados obstáculos al ejercicio de acciones de indemnización por daños en materia de defensa de la competencia en los Estados miembros. Los elevados costes legales y la incertidumbre acerca del resultado de la acción desincentivan su ejercicio. El *onus probandi* es elevado, ya que los demandantes han de acreditar no sólo la existencia de una infracción de las normas de competencia y demostrar la relación de causalidad entre la infracción y el daño sufrido como resultado de ella, sino también cuantificar el importe exacto de dicho daño. Dado que el acceso a la prueba es limitado en la mayor parte de los Estados miembros, la mayoría de los demandantes se ven posiblemente desincentivados a iniciar un procedimiento por su prolongada duración y coste, dado que pueden carecer de los recursos financieros y la experiencia necesarios para interponer una demanda de indemnización por daños derivados de infracción de las normas de competencia.

Para los consumidores, en particular aquellos cuya pretensión sea de relativamente pequeña cuantía en comparación con los elevados costes de las demandas de indemnización por daños, la tarea se torna virtualmente imposible, y resulta impensable el ejercicio de acciones independientes. Pero también las pequeñas y medianas empresas

pueden enfrentarse a los mismos obstáculos, especialmente cuando sean compradores indirectos y se les exija demostrar el importe exacto del sobrecoste que se les ha trasladado. En consecuencia, sería de gran relevancia para los consumidores y las pequeñas y medianas empresas que pudiesen ejercer acciones colectivas de forma conjunta con otras víctimas, al objeto de permitirles reducir los costes y riesgos asociados al ejercicio de la acción y tener un incentivo real para ejercitarla.

El estado actual de la aplicación privada demuestra que son necesarias medidas para incentivar que los afectados por una práctica anticompetitiva interpongan demandas de indemnización por daños, así como para garantizar el cumplimiento general de las normas de defensa de la competencia de la UE. Dado que los consumidores son los que probablemente sufren en último término los efectos negativos de estas infracciones, en forma de precios más elevados, menor calidad y variedad de productos, etc., son en particular sus posibilidades de reclamar daños las que deben ampliarse y reforzarse. Las acciones colectivas podrían ser el remedio apropiado al efecto.

La necesidad de introducir algún tipo de instrumento eficaz de actuación o acción colectiva en la Unión Europea es especialmente grande por lo que se refiere a los consumidores que han sufrido pérdidas como resultado de unos precios más elevados. En la actualidad, el coste y la incertidumbre sobre el resultado del litigio disuaden a éstos de reclamar una indemnización, particularmente cuando las pérdidas sufridas a nivel individual son reducidas. Sin embargo, el daño global sufrido por todos los consumidores y los beneficios económicos obtenidos por los miembros del cártel pueden haber sido sustanciales. Por ese motivo, sólo si los consumidores pueden unir sus fuerzas mediante la interposición de una acción colectiva existirá una posibilidad real de que un gran número de víctimas obtenga el pleno resarcimiento de sus pérdidas en estos casos.

La posibilidad de decidir en un único procedimiento sobre múltiples demandas de menor cuantía, cuyo valor total puede ser no obstante considerable, garantizaría por tanto el acceso a la justicia. Igualmente, de este modo los tribunales no se verían obligados a decidir una y otra vez sobre múltiples asuntos similares, lo que aliviaría su carga de trabajo y redundaría en una mejor administración de justicia. Las acciones colectivas podrían también contribuir a reducir las dificultades en los casos de compra

indirecta, si las demandas de los compradores indirectos pudiesen consolidarse con las interpuestas por los compradores directos; de esta forma, un primer procedimiento podría determinar el sobre coste total generado por la fijación de precios, en tanto que el segundo procedimiento distribuiría las indemnizaciones de daños entre los distintos compradores en la cadena de distribución. Ello eliminaría a su vez las indemnizaciones múltiples.

En términos generales, las acciones colectivas entrañarían menores costes no sólo para los demandantes, sino también para los demandados y favorecerían una mayor seguridad jurídica, en la medida en que todas las demandas se resolverían posiblemente de una sola vez. Asimismo, reducirían la asimetría entre las partes especialmente en aquellas situaciones en las que existan múltiples demandas de pequeña cuantía y, en consecuencia, potenciarían el efecto disuasorio.

Sin embargo, existen ciertos riesgos asociados a las acciones colectivas. Al reducir el coste legal de litigar y facilitar por tanto el inicio de un procedimiento, podrían llevar consigo la interposición de demandas carentes de fundamento. Los demandados, por su parte, podrían sentirse inclinados a transar para evitar el procedimiento judicial, incluso aunque su conducta no constituya una infracción de las normas de defensa de la competencia. No obstante, los riesgos anteriores pueden mitigarse sustancialmente mediante la adopción de las cautelas adecuadas.

En todo caso, las acciones colectivas que actualmente existen en los Estados miembros no proporcionan, en general, una reparación o resarcimiento suficiente y efectivo. De los seis Estados miembros analizados en esta tesis, tan sólo el Reino Unido y Francia contemplan de modo expreso acciones “de representación” o acciones colectivas de indemnización por daños basadas en un incumplimiento del derecho nacional o europeo de defensa de la competencia. Además, en la actualidad dichas acciones sólo pueden ser objeto de interposición como acciones “de seguimiento” o derivadas, ejercitables tras la adopción por la Comisión o las autoridades de competencia nacionales de una decisión en la que se declare la existencia de la infracción en cuestión. Por otra parte, la legitimación activa para el ejercicio de estas acciones está actualmente limitada a los consumidores, aunque las pequeñas y medianas empresas podrán interponer acciones colectivas en el Reino Unido en un futuro próximo. Es importante también poner de

manifiesto que en Francia la acción colectiva sólo es ejercitable por las asociaciones francesas de consumidores, lo que priva a otras asociaciones de consumidores de la posibilidad de interponer una acción colectiva en ese país en nombre de consumidores de distintos Estados miembros.

La situación en Alemania es aún más insatisfactoria, dado que únicamente cabe el ejercicio de acciones colectivas para órdenes de cesación o para que se ordene a los infractores transferir sus beneficios ilícitos al Tesoro. Esto es, no es posible formular demandas de indemnización por daños a través de este tipo de acciones. La acción colectiva contemplada en el ordenamiento finés es también limitada en términos comparativos, ya que únicamente está legitimado para su ejercicio el Defensor del Consumidor, en nombre de un grupo que pueda determinarse con antelación.

En España, sólo las asociaciones de consumidores y usuarios pueden ejercer acciones colectivas de indemnización por daños derivados de infracciones de las normas de defensa de la competencia; las empresas carecen de esta posibilidad. Si los miembros del grupo afectado están identificados o son fácilmente identificables, también dicho grupo puede plantear acciones colectivas de indemnización por daños. Sin embargo, la indemnización se concede en relación con cada demandante individual y no al grupo en su conjunto, por lo que cada demandante ha de solicitar al tribunal su reconocimiento como miembro del grupo, así como la cuantificación de los daños individuales. Si la demanda es de muy pequeña cuantía, el demandante puede decidir no adherirse a la acción, ya que en muchos casos será difícil calcular el importe exacto del daño que ha sufrido. Además, la acción colectiva sólo es susceptible de interposición por parte de los consumidores, lo que hace especialmente difícil para las pequeñas y medianas empresas ejercitar sus derechos como perjudicados por una infracción de las normas de defensa de la competencia.

En contraste con lo anterior, la acción privada de grupo sueca se consideró en el momento de su adopción como una acción colectiva potencialmente extensiva, pese a estar basada en un mecanismo de “participación voluntaria” (*opt-in*). La citada acción puede interponerse por una persona física o jurídica en nombre del grupo afectado. Únicamente el demandante “del grupo” será parte del procedimiento y, como regla general, los miembros pasivos del grupo no están obligados al pago de costas en caso de

desestimación de la demanda. Lo que hace atractivo este tipo de acción, al menos en un plano teórico, es la posibilidad de hacer uso de una versión modificada del pacto de cuota litis, el denominado “acuerdo de riesgos”, para el ejercicio de la acción. Sin embargo, hasta la fecha no se ha hecho uso de este tipo de acciones para reclamar indemnizaciones por daños derivados de ilícitos anticompetitivos, de modo que esta acción de grupo basada en el modelo de participación o inclusión voluntaria tampoco parece ser la solución para potenciar las demandas de indemnización por daños.

La experiencia de los seis ordenamientos examinados demuestra que la situación actual en la Unión Europea, en relación con el ejercicio de acciones colectivas es claramente insatisfactoria. En la práctica, este mecanismo de resarcimiento que sólo es realmente efectivo – en términos potenciales – para los consumidores que hayan sufrido daños como consecuencia de una conducta anticompetitiva no es por lo general una alternativa atractiva, dado que las acciones colectivas que existen en la actualidad presentan numerosas deficiencias. Como se ha visto, en los ordenamientos en los que existen dichas acciones, rara vez se interponen, y su grado de éxito es muy limitado. Debido al modelo de participación voluntaria, en muchos casos el grupo de demandantes es demasiado reducido como para que compense el ejercicio de la acción y lleva aparejado un alto grado de complejidad administrativa y costes elevados.

A mayor abundamiento, existen otras razones que explican porqué los consumidores no ejercen con mayor frecuencia acciones de indemnización por daños y perjuicios. Los consumidores no son necesariamente conscientes de que han sido víctimas de un cártel, puesto que éstos son generalmente acuerdos secretos y su detección es costosa incluso para las autoridades de competencia, que disponen de amplios poderes de investigación. Dado que los litigantes privados tienen un acceso limitado a las pruebas, y que la carga probatoria es elevada, la acreditación de la existencia de una conducta anticompetitiva es tarea difícil. Adicionalmente, el riesgo de desestimación de la demanda, unido a la obligación de abonar las costas de la otra parte constituyen un desincentivo al inicio de procedimientos por parte de aquellos demandantes cuyas demandas sean de pequeña cuantía. La regla de que “el perdedor paga” (*i.e.*, la imposición de las costas a la parte cuyas pretensiones se desestimen) se aplica en todas las jurisdicciones, aun cuando algunos tribunales (*e.g.* el *Competition Appeal Tribunal* o Tribunal de Apelación en Materia de Competencia del Reino Unido) tienen un mayor grado de discrecionalidad

para decidir acerca de la imposición de las costas del procedimiento. También existen reglas más flexibles en materia de costas para determinados tipos de demandas. Asimismo, existen todavía limitaciones al uso del pacto de *cuota litis*, aun cuando un número creciente de Estados miembros parecen proclives a permitirlo en determinados supuestos.

Lo anterior, unido a las limitadas posibilidades de ordenar la comunicación de documentos/información en poder de la otra parte o de terceros, hace que la única alternativa realista de interponer una acción de indemnización en materia de defensa de la competencia sea, a menudo, el ejercicio de una acción derivada o “de seguimiento”. Y, de nuevo, incluso en la mayor parte de estos casos los consumidores necesitarían una acción colectiva eficaz al objeto de reducir los costes y riesgos inherentes al litigio y hacer posible que se generen economías de escala.

En consecuencia, cabe asumir que la razón por la que no se ha hecho uso de las acciones colectivas es, al menos en parte, que en su forma actual estas acciones no son percibidas por los consumidores como un mecanismo eficiente de resarcimiento y que las asociaciones de consumidores no tienen incentivos para plantear acciones indemnizatorias por infracciones de las normas de competencia o simplemente carecen de la experiencia y recursos necesarios. Por último, como en la mayor parte de los ordenamientos únicamente las asociaciones de consumidores y usuarios y/o los grupos de consumidores afectados están legitimados para interponer acciones colectivas de indemnización por daños y perjuicios, los competidores y otras empresas, que podrían tener un mejor conocimiento de la existencia de ilícitos anticompetitivos, así como de las normas de defensa de la competencia, están excluidos del ejercicio de dichas acciones. Es, en consecuencia, necesaria una solución común a escala europea para dotar de efectividad al derecho reconocido por la Unión Europea a la indemnización por daños y perjuicios.

C.1.3 La solución propuesta por el legislador europeo y sus principales deficiencias

El legislador europeo trata de potenciar el ejercicio de acciones de indemnización por daños en materia de competencia de dos formas distintas: la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, que prevé la

armonización o aproximación de determinadas normas procesales por las que se rige el ejercicio de las acciones de indemnización por daños y una Recomendación sobre los Mecanismos de Recurso Colectivo. Se considera que, aun cuando estos instrumentos pueden tener algún valor en la medida en que probablemente contribuirán a armonizar o aproximar ciertos aspectos que han generado obstáculos a la aplicación privada en el pasado y codificarán algunos principios de Derecho de la UE por los que se rigen las acciones de indemnización por daños en materia de defensa de la competencia, muchas de las medidas a introducir son meros mínimos de armonización o simples recomendaciones. En consecuencia, continuarán existiendo divergencias entre los Estados miembros en diversas áreas, y es discutible que estos instrumentos vayan a mejorar el acceso a la justicia, especialmente para los consumidores perjudicados por una conducta anticompetitiva.

Por lo que se refiere a la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, sus principales contribuciones consisten en que establece un nivel mínimo de exhibición de pruebas una vez que el demandante haya presentado los hechos y medios de prueba que estén razonablemente a su alcance y acrediten el carácter plausible de su demanda de indemnización por daños, y unos plazos mínimos de prescripción para el ejercicio de acciones de indemnización por daños y perjuicios derivados de infracciones de las normas de defensa de la competencia, tanto de forma independiente (*stand-alone actions*) como derivada (*follow-on actions*). Adicionalmente, contiene disposiciones en relación con el efecto probatorio de las decisiones o resoluciones de las autoridades nacionales de competencia (en lo sucesivo, las “ANC”) que declaran la existencia de una infracción, la responsabilidad solidaria de los infractores (incluido el derecho a exigir una contribución), la denominada *passing-on defense* y la cuantificación del daño, así como disposiciones dirigidas a fomentar la resolución consensual de litigios.

La introducción de una obligación mínima de exhibición de medios de prueba constituye un desarrollo legislativo sumamente positivo, teniendo en cuenta la asimetría en materia de información que generalmente existe entre los infractores de las normas de defensa de la competencia y los perjudicados. Cabe afirmar que el limitado acceso a los medios de prueba es uno de los principales obstáculos al ejercicio de acciones de indemnización por daños en este ámbito y la posibilidad de requerir la exhibición de

dichos medios de prueba debería contribuir a facilitar la interposición de demandas de daños y perjuicios, siempre que también se aborden de forma adecuada otros obstáculos relevantes (*i.e.*, la necesidad de reducir los costes y facilitar las demandas por parte de los consumidores mediante mecanismos de recurso colectivo).

Sin embargo, la Directiva deja otras cuestiones que han de ser objeto de tratamiento. Así, una dificultad relevante reside en el hecho de que determinados tipos de documentos, en concreto las declaraciones efectuadas en el marco del programa de clemencia y las solicitudes de transacción, están íntegramente excluidas de la exhibición de medios de prueba, sin que exista obligación alguna de llevar a cabo previamente un *test* de proporcionalidad acerca de si éstas, o al menos una parte de la información contenida en ellas, deben revelarse al demandante al objeto de posibilitar el ejercicio de una acción de indemnización por daños, especialmente cuando tal ejercicio resulte imposible sin el acceso a parte de esta información. Frente a lo anterior, en línea con lo declarado en la sentencia *Pfleiderer*, se sugiere en esta tesis que los tribunales nacionales deberían tener capacidad real para valorar las consecuencias de conceder o denegar la solicitud de exhibición de medios de prueba, tanto para la aplicación pública como privada. La actual Directiva pone el énfasis en proteger – más de lo necesario – la aplicación pública, en detrimento de la aplicación privada. Sería preciso un enfoque más equilibrado al objeto de garantizar que la aplicación privada pueda servir de importante complemento a la aplicación pública, en lugar de jugar meramente un papel residual.

Conforme a la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, las decisiones o resoluciones firmes de una ANC declarando la existencia de una infracción tendrán efectos probatorios en lo que se refiere a la constatación de la infracción, en ulteriores acciones de indemnización por daños, pero únicamente si éstas se ejercen en el mismo Estado miembro. En caso de que la demanda de daños se interponga ante los tribunales de otro Estado miembro, es posible que haya de volver a enjuiciarse la existencia de una infracción de la normativa de defensa de la competencia, lo que supondrá una pérdida de tiempo y recursos e incrementará el coste de la acción. En último término, ello dependerá no obstante de las normas del Estado miembro en cuestión, en la medida en que éste puede conceder dicho efecto vinculante con arreglo a su legislación doméstica.

Al objeto de facilitar la interposición por los consumidores o las asociaciones de consumidores de demandas derivadas o “de seguimiento”, se considera que debería otorgarse igualmente a las decisiones firmes de las ANC’s y de los tribunales de competencia una presunción de efectos vinculantes en procedimientos civiles ante los tribunales de otros Estados miembros. A cambio, podría permitirse al demandado refutar esa presunción si la misma vulnera los requisitos de un proceso equitativo o si el alcance geográfico de la infracción hace que no resulte pertinente o relevante respecto de la demanda indemnizatoria, en relación con el mercado en el Estado miembro en el que se interpone. Adicionalmente, la presunción de efectos vinculantes podría rebatirse si existieron errores de hecho manifiestos en la investigación.

Por su parte, el establecimiento de algunas normas comunes en relación con los plazos de prescripción contribuirá a incrementar la seguridad jurídica. Igualmente, debería favorecer la interposición de demandas de indemnización por daños y perjuicios, especialmente en aquellos Estados miembros en los que los plazos de prescripción son en la actualidad muy breves. El requisito de que la víctima ha de tener conocimiento de la infracción y del daño que ésta le ha irrogado antes de iniciarse el cómputo del plazo de prescripción es crucial ya que, en otro caso, el plazo de prescripción podría haber expirado incluso antes de que la víctima haya tenido conocimiento de la infracción. Sin embargo, deberían proporcionarse directrices comunes sobre los criterios que habrían de valorarse al objeto de determinar si el demandante tenía tal conocimiento. De lo contrario se generará incertidumbre acerca del momento de inicio del cómputo del plazo de prescripción. Por otra parte, al establecer únicamente plazos de prescripción mínimos, la Directiva respeta el principio de autonomía procesal. Para las situaciones no específicamente reguladas por la Directiva, los plazos de prescripción habrán de respetar los límites establecidos por los principios de equivalencia y eficacia.

La Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia establece que las empresas responden “*conjunta y solidariamente*” del daño causado por su comportamiento común. Sin embargo, una empresa a la que se ha concedido inmunidad en virtud de un programa de clemencia, sólo responderá frente a perjudicados distintos de sus compradores directos o indirectos, o de sus proveedores si aquéllos no han podido obtener la reparación íntegra de otros infractores. Las disposiciones en materia de responsabilidad tratan de restringir la responsabilidad de

una empresa a la que se ha concedido inmunidad, pero únicamente pueden hacerlo con un alcance limitado, en la medida en que debe respetarse siempre el derecho de las víctimas a obtener un resarcimiento pleno y, por otra parte, dado que las indemnizaciones por daños concedidas son únicamente indemnizaciones individuales, la posibilidad de restringir la responsabilidad por daños es limitada.

Estas disposiciones hacen también posible para los perjudicados interponer acciones contra el demandado que esté en mejores condiciones de poder satisfacer la indemnización. Desde la perspectiva de los demandantes, lo anterior simplifica el proceso de reclamación, en la medida en que les permite obtener de un único demandado la indemnización correspondiente a la totalidad del daño sufrido. Los demandantes no necesariamente habrán de ser clientes directos del demandado, sino que en coherencia con lo declarado en la sentencia *ÖBB-Infrastruktur*, en la medida en que puedan demostrar que el demandado debió haber tomado en consideración que la conducta anticompetitiva podía dar lugar a la pérdida sufrida por los perjudicados, éste podrá ser declarado responsable civil del daño. Para el demandado, lo anterior puede generar incertidumbre acerca de si podrá obtener la contribución de los demás coinfractores, ya que algunos de ellos podrían haber dejado de existir y los costes de individualizar la responsabilidad correspondiente a cada coinfractor por el daño causado a los perjudicados podrían ser sustanciales.

La Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia permite la *passing-on defense*, pero pesa sobre el infractor la carga de probar que se ha trasladado el sobrecoste. La carga de la prueba en relación con la traslación (*passing-on*) es distinta en los casos en que existen compradores indirectos que reclaman una indemnización por los daños resultantes de un sobrecoste que se ha trasladado en todo o en parte al demandante. Los compradores indirectos han de demostrar, la existencia de dicha traslación, aunque se permitirán requerimientos razonables de comunicación o exhibición al demandado y a terceros. Permitir la *passing-on defense* podría constituir un obstáculo al ejercicio de acciones de daños, ya que los compradores indirectos y especialmente los consumidores que se encuentran al final de la cadena de distribución tendrán grandes dificultades para probar el importe exacto que se les ha trasladado, especialmente en situaciones en las que hayan existido varios intermediarios. Al objeto de mitigar los efectos de la *passing-on defense*, los consumidores deberían tener la posibilidad de unir fuerzas mediante el ejercicio de una

acción colectiva o “de representación”, a fin de poder repartir los costes del procedimiento judicial.

Por lo que se refiere a la cuantificación del daño, la Directiva contiene una presunción *iuris tantum* de que los cárteles ocasionan daños. La Comisión ha adoptado también directrices sobre cuantificación del daño en las demandas de indemnización por daños en materia de defensa de la competencia. A pesar de que dichas directrices no son vinculantes, el hecho de que se haya mejorado la evaluación del daño concediendo un mayor protagonismo a los jueces nacionales y haciendo posible la participación de las autoridades de competencia en la valoración del daño no deja de ser un desarrollo positivo. Esto podría al menos facilitar en alguna medida la indemnización, especialmente a los compradores indirectos, que son los que generalmente tienen mayores dificultades para probar el importe exacto del daño que se les ha trasladado.

Pese a lo anterior, siguen existiendo problemas. A título ejemplificativo, no se han establecido reglas comunes en materia de causalidad, carácter mediato o remoto del daño, o cuantificación de las pérdidas, por lo que continuarán prevaleciendo las divergencias a escala nacional. Asimismo, la carga de la prueba y el estándar probatorio necesario en relación con la cuantificación del daño vendrán en buena medida determinados por la legislación nacional, que deberá respetar los principios de equivalencia y eficacia. Los tribunales nacionales podrán decidir discrecionalmente en qué medida se ajustan a las directrices – no vinculantes – de la Comisión sobre cuantificación del daño, por lo que, una vez más, los métodos empleados pueden variar significativamente entre Estados miembros. Cabe igualmente esperar que la prueba económica prolongue y encarezca los litigios.

El interés de la Directiva por fomentar la resolución consensuada de litigios podría eventualmente proporcionar a los consumidores, y quizás también a las pequeñas y medianas empresas, al menos una posibilidad de obtener algún tipo de indemnización, ya que sin mecanismos eficaces de recurso colectivo, el actual ejercicio por éstos de su derecho de indemnización es limitado en la mayoría de los Estados miembros. Sin embargo, dada la ventajosa regulación prevista para los coinfractores que transen (*e.g.* suspensión de los procedimientos de indemnización por daños, responsabilidad limitada para dichos coinfractores y obligación de contribución limitada), podría existir el riesgo

de que, en la práctica, la Directiva tuviese por efecto un incremento del uso de los mecanismos de resolución alternativa de litigios, en perjuicio de las demandas de daños. Ello podría resultar problemático teniendo en cuenta que los perjudicados suelen ser la parte más débil y que no existirá igualdad de armas, ya que los infractores son quienes generalmente tienen acceso a la mayor parte de la prueba relevante necesaria para acreditar la infracción y el alcance del daño.

Por otra parte, la Directiva no incorpora el tratamiento de determinadas cuestiones. A modo de ejemplo, no regula un mecanismo de recurso colectivo, ni contiene reglas relativas al requisito de culpabilidad de la conducta o al coste de las acciones indemnizatorias por daños en el ámbito de defensa de la competencia. Dado que el coste de estas acciones es a menudo un obstáculo relevante al planteamiento de una demanda, especialmente para los consumidores cuyas demandas individuales sean de pequeña cuantía, serían necesarias ciertas normas o, al menos, recomendaciones, relativas a las reglas en materia de costes. Igualmente, debería valorarse una potencial modificación del principio de que “el perdedor paga” en línea con lo dispuesto en la Directiva 2004/48/CE relativa al respeto de los derechos de propiedad intelectual.

Junto a lo anterior, debería reconsiderarse la prohibición de los denominados “daños punitivos” o “múltiples a escala europea, por cuanto resulta contraria al vigente Derecho de la Unión Europea. Por el contrario, debería examinarse su utilidad para ciertos tipos de infracciones, en concreto los cárteles, en la medida en que podría reforzar los efectos disuasorios respecto de los comportamientos anticompetitivos más nocivos.

Pero la principal omisión de la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia es la total ausencia de algún tipo de mecanismo de recurso colectivo. En lugar de ello, la Comisión se ha limitado a introducir recomendaciones no vinculantes en relación con estos mecanismos. La Recomendación de la Comisión sobre los Mecanismos de Recurso Colectivo pretende establecer algunos principios comunes a los recursos colectivos de cesación e indemnización, en lo que se refiere a la legitimación para el ejercicio de acciones “de representación”, la admisibilidad de este tipo de acciones, la información acerca de las acciones colectivas, el reembolso de las costas de la parte cuyas pretensiones se estimen, la financiación y los casos transfronterizos. Por lo que respecta

específicamente al recurso colectivo de indemnización, la Comisión ha emitido recomendaciones en relación con la constitución del grupo, basadas en el principio de “participación voluntaria”, las modalidades alternativas de solución de litigios de carácter colectivo y transacciones, los honorarios legales, la prohibición de indemnizaciones o daños “punitivos”, la financiación y las acciones colectivas “de seguimiento” o derivadas. Todos ellos son aspectos importantes que deben ser tomados en consideración para diseñar una óptima acción colectiva de indemnización, pero cabe pensar que el instrumento jurídico elegido no será susceptible de producir una mejora sustancial en esta materia a medio plazo. Una directiva sería un instrumento jurídico más eficiente, en la medida en que impone a los Estados miembros obligaciones vinculantes, al tiempo que permite el respeto de las distintas tradiciones jurídicas y deja a los Estados miembros cierto margen de elección respecto de la forma de las medidas a poner en práctica.

Ciertamente, la Recomendación de la Comisión incluye aspectos que merecería la pena explorar, al objeto de proponer una disposición legal europea de carácter vinculante y general. A título de ejemplo, el enfoque horizontal y la posibilidad solicitar, tanto una orden de cesación, como una indemnización colectivas son aspectos positivos, en la medida en que a menudo los consumidores también se enfrentan a dificultades a la hora de interponer demandas en otros campos del derecho distintos del derecho de defensa de la competencia, como los de las demandas medioambientales o en materia de consumo. Sería necesario un instrumento vinculante que permitiese una mejora real del acceso a la justicia por parte de los consumidores.

Por otra parte, las recomendaciones no son suficientemente amplias, ya que los principios comunes establecidos en ellas están en general basados en impulsar un tipo modesto de acciones colectivas y medios de financiación conservadores. Uno de los principales problemas de los actuales mecanismos de recurso colectivo a escala nacional reside en que éstos se basan habitualmente en el principio de “participación voluntaria”, y el coste de las acciones constituye una barrera sustancial a la interposición de demandas de indemnización por daños derivados de infracciones de las normas de competencia. Los casos *Camisetas de Fútbol (Football Shirts)* y el *Cártel de los Móviles*, en el Reino Unido y Francia, ilustran la limitada efectividad del modelo de participación voluntaria. En el primero de ellos sólo obtuvieron indemnización una

pequeña parte de los perjudicados y el segundo fue desestimado. Cabe afirmar que el único modo eficaz de asegurar la “tutela judicial efectiva” de los consumidores conforme a lo dispuesto en el artículo 47.1 de la Carta de los Derechos Fundamentales de la Unión Europea sería dejar a los tribunales la decisión acerca de si una acción de resarcimiento colectiva debe interponerse sobre la base del modelo de “participación voluntaria” (*opt-in*) o “exclusión voluntaria” (*opt-out*), al menos en los casos en que se planteen múltiples acciones de indemnización por daños y perjuicios de pequeña cuantía.

La Recomendación de la Comisión es igualmente demasiado restrictiva en lo que se refiere al pacto de cuota litis y a los mecanismos alternativos de financiación de acciones colectivas. Dado que la financiación pública está disminuyendo, se hace necesario asegurar financiación suficiente para las acciones colectivas introduciendo en la Unión Europea el pacto de *cuota litis* (o buscando otras alternativas de financiación). Si el pacto de *cuota litis* se sujeta a revisión judicial o se regula por alguna otra vía eficaz se podrán reducir sus potenciales efectos negativos. Por otra parte, limitando las obligaciones de los miembros del grupo en materia de pago de las costas al representante del grupo y a aquellos miembros que hayan tenido *de facto* la oportunidad de ejercer su derecho de exclusión, la acción colectiva de “exclusión voluntaria” no debería en general plantear problemas de constitucionalidad.

Por último, el aspecto relativo a la distribución de las indemnizaciones por daños es también importante, sobre todo en los casos en que existen demandantes que operan en distintos niveles de la cadena de distribución y, en particular, en acciones colectivas. Sería por ello necesario decidir sobre cómo deberían distribuirse aquellas indemnizaciones que no puedan ser distribuidas entre las víctimas. Se considera que deberían contemplarse normas sobre distribución “*cy pres*” (i.e., se trata de aquella en que las indemnizaciones por daños no se distribuyen directamente a los perjudicados por una infracción de las normas de competencia para resarcirles del daño sufrido, sino que se emplean para alcanzar un resultado que sea lo más próximo posible a la reparación del daño).

Entre los aspectos que no han sido objeto de tratamiento satisfactorio están también la coordinación de las acciones públicas y privadas en situaciones transfronterizas y las

normas sobre competencia (*i.e.* jurisdicción). En aquellos ámbitos del derecho en los que una autoridad pública puede adoptar una decisión declarando la existencia de una infracción del Derecho de la Unión Europea, dicha autoridad nacional debería poder actuar como *amicus curiae* en la acción colectiva de resarcimiento, a fin de que no se prolonguen de forma automática los procedimientos de resarcimiento colectivo o se impida el ejercicio de acciones independientes. Ello está justificado especialmente en aquellos casos en los que la decisión declarando la existencia de una infracción adoptada por una ANC no evalúa si la infracción ha producido efectivamente daños, ya que el valor del expediente administrativo puede ser limitado a efectos de probar éstos. Igualmente, sería necesario garantizar una aplicación coherente y uniforme de la normativa de defensa de la competencia de la UE cuando se inicie un procedimiento ante la ANC de algún Estado miembro y simultáneamente se interponga una demanda de indemnización por daños y perjuicios ante un tribunal de otro Estado miembro. En tales supuestos algunos han argumentado que podría modificarse la regla de litispendencia contemplada en el Reglamento 44/2001, para permitir al tribunal ante el que se haya ejercido una acción de resarcimiento colectivo declararse incompetente para conocer del asunto si existe un foro más apropiado en el que éste pudiese tramitarse de una forma más eficaz. Sin embargo, sería difícil lograr tal modificación en la práctica.

Del análisis conjunto de las potenciales repercusiones de la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia y de la Recomendación de la Comisión sobre Mecanismos de Recurso Colectivo, se extrae la conclusión de que probablemente su impacto positivo sobre la aplicación privada será bastante modesto y en términos generales fracasarán en el objetivo de mejorar el acceso a la justicia, especialmente por parte de los consumidores. Es por ello que serían precisas medidas legislativas más eficaces para garantizar la aplicación efectiva y uniforme del derecho reconocido por la Unión a la indemnización de daños por infracciones de las normas de defensa de la competencia. Dado que la aplicación privada del derecho de defensa de la competencia juega un papel notablemente más relevante en los Estados Unidos y se están incrementando en Canadá, la experiencia de ambos países en esta materia podría servir de valiosa inspiración acerca de cómo potenciar las acciones de indemnización por daños en la Unión Europea, tomando por supuesto en consideración las particularidades de los ordenamientos europeos y sus tradiciones jurídicas.

C.1.4. Lecciones a aprender de las experiencias norteamericana y canadiense en materia de aplicación privada

En los Estados Unidos, las acciones de indemnización por daños representan en torno al 90% de la aplicación privada del derecho de defensa de la competencia. Ello puede tener su explicación en la legislación procesal civil norteamericana, que contempla incentivos adicionales a la interposición de demandas en materia de defensa de la competencia, tales como la concesión de indemnizaciones por el triple del importe del perjuicio (los denominados *treble damages*) o las reglas sobre “desplazamiento de honorarios” en beneficio del demandante. A su vez, los abogados desempeñan un papel importante, dado que prácticamente todas las acciones colectivas se interponen sobre la base de pactos de *cuota litis*. Estas características probablemente facilitan el ejercicio de acciones incluso en casos fundados pero complejos. Sin embargo, al objeto de evitar posibles abusos y de asegurar un resultado equitativo para los miembros del grupo, es necesario verificar que los intereses de los abogados están estrechamente alineados con los de los miembros del grupo.

En la tarea de reducir los riesgos inherentes a las acciones colectivas, puede aprenderse mucho de las acciones colectivas (*class actions*) norteamericanas y canadienses. La acción colectiva del derecho norteamericano se basa en el principio de “exclusión voluntaria” (*opt-out*), que permite también interponer demandas en nombre de miembros del grupo no identificados. La ventaja de lo anterior residen en que el grupo será generalmente lo suficientemente amplio como para que merezca la pena ejercer la acción, incluso en el supuesto de que los daños individuales de los miembros del colectivo harían que no resultase económicamente viable su ejercicio individual. El principal inconveniente del modelo de exclusión voluntaria es que los perjudicados quedarán vinculados por la sentencia o acuerdo transaccional que se dicte o alcance como resultado del ejercicio de la acción si no se han excluido del grupo en tiempo y forma. Otro inconveniente, éste desde la perspectiva del demandado, es que las exclusiones hacen que la transacción tenga menos sentido. No obstante, la ventaja es que el demandante conocerá el número exacto de demandas potenciales que resten por interponer.

De forma similar, en Canadá la introducción de las acciones colectivas ha incrementado el ejercicio de las acciones de indemnización por daños en materia de defensa de la competencia. Ontario y algunas otras jurisdicciones contemplan acciones colectivas de exclusión voluntaria, mientras que otros territorios, como la Columbia Británica, han optado por una combinación de los regímenes de “participación voluntaria” y “exclusión voluntaria”: el principio de exclusión voluntaria se aplica a los residentes, mientras que los no residentes están sujetos al principio de participación voluntaria. Por otra parte, se admiten pactos de *cuota litis* generosos, al objeto de garantizar el acceso a la justicia. Tanto en Estados Unidos como en Canadá los acuerdos transaccionales han de ser aprobados por un tribunal y deben ser equitativos, razonables y concluirse en interés y beneficio del grupo.

Sin embargo, en la Unión Europea, las acciones colectivas de exclusión voluntaria y, especialmente, la *class action* del derecho norteamericano han sido tradicionalmente vistas con escepticismo. Cabe argumentar que esta resistencia a las “acciones de clase” en Europa se deba al menos parcialmente al desconocimiento de las acciones del tipo del modelo norteamericano. Otras características del proceso civil norteamericano, tales como los juicios con jurado y las indemnizaciones por el triple del importe del daño (los *treble damages* citados anteriormente) que son posibles, aunque no necesarias, en acciones colectivas son sin embargo percibidas a menudo como parte inherente de éstas. A modo de ejemplo, los *treble damages* se conceden también de forma automática en caso de estimación de una acción individual de indemnización por daños en materia de defensa de la competencia, por lo que no constituyen una característica especial de la acción colectiva. Por otra parte, los abusos del mecanismo de las acciones colectivas se producen fundamentalmente en otros ámbitos del derecho; la complejidad e incertidumbre acerca del resultado de las acciones colectivas en materia de defensa de la competencia tiende a limitar los abusos. De hecho, el American Antitrust Institute (Instituto Americano para la Defensa de la Competencia) ha señalado incluso que no existen pruebas de acuerdos transaccionales poco fundados. Bien al contrario, en ocasiones los demandantes transan casos fundados por cuantías pequeñas. Adicionalmente, la Ley norteamericana de Equidad en el ejercicio de Acciones Colectivas (*Class Action Fairness Act* de 2005) ha limitado aún más el riesgo de abusos, estableciendo por ejemplo que los honorarios de los letrados deben estar alineados con

los importes indemnizatorios concedidos a los miembros del grupo en casos de transacción de acciones colectivas (*coupon settlement*).

Del mismo modo, dado que determinadas provincias canadienses han optado por el modelo de exclusión voluntaria, sin que se tenga conocimiento de que ello haya llevado a abusos de los procedimientos de acción colectiva, y el número de éstas ha sido razonable gracias al control de los tribunales, no existen razones para excluir por completo este modelo de acciones colectivas en la Unión Europea. Por el contrario, existe una necesidad de acciones de exclusión voluntaria en aquellos casos en los que la cuantía de las demandas individuales haría que fuesen demasiado pequeñas como para interponerlas. En tales situaciones, el derecho constitucional al acceso a la justicia quedaría mejor garantizado en este modelo. A pesar de que el modelo de participación voluntaria permite asegurar en mayor medida que un particular no participará en un litigio en contra su voluntad, la posibilidad de que todos los particulares hagan valer sus derechos en ese escenario es, en la práctica, limitada y no necesariamente cumplirá con el artículo 47 de la Carta de los Derechos Fundamentales de la Unión Europea.

A la luz de las experiencias norteamericana y canadiense cabe concluir que las acciones colectivas son una herramienta valiosa a efectos de la aplicación privada del derecho de defensa de la competencia. En consecuencia, la Unión Europea debería considerar la posibilidad de introducir un instrumento similar a las *class actions* que podría, no obstante, adaptarse a las especificidades de los ordenamientos jurídicos europeos. Probablemente, ello reforzaría fundamentalmente el ejercicio de acciones derivadas, pero también podría ser útil en acciones independientes relativas a abusos de posición de dominio y restricciones verticales.

C.2. El camino a seguir

Los recientes instrumentos legislativos adoptados por la Unión Europea con el fin de potenciar la aplicación privada son un paso en la buena dirección, aun cuando resultan insuficientes para facilitar el acceso a la justicia, en especial a los consumidores. No obstante lo anterior, los citados instrumentos podrían servir como base para una futura directiva en materia de acciones colectivas en supuestos de daños en masa, así como,

modificando y mejorando las disposiciones actuales, para facilitar la interposición de demandas de daños por infracción de las normas de defensa de la competencia.

Se considera que entre las principales modificaciones que requiere la Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, están las relativas a asegurar un mayor equilibrio entre la aplicación pública y privada en relación con el acceso a la prueba, así como a coordinar de forma más eficiente de los procedimientos administrativos incoados en un Estado miembro con las demandas de indemnización por daños interpuestas en otro Estado miembro. También deberían especificarse con mayor precisión los plazos de prescripción para la interposición demandas de indemnización por daños derivados de infracciones las normas de defensa de la competencia. Y lo que es más importante: debería introducirse una acción colectiva vinculante a escala UE para casos de dimensión transfronteriza y los tribunales deberían estar facultados para decidir caso por caso si ésta debe ejercerse sobre la base del principio de “participación voluntaria” o del de “exclusión voluntaria”. El aspecto relativo a la distribución de las indemnizaciones por daños, así como los tipos de indemnización disponibles también requerirían un mayor desarrollo. Junto a lo anterior, habrían de revisarse las reglas relativas a las costas, así como las aplicables en materia de financiación de las acciones de indemnización por daños derivados de infracciones de las normas de defensa de la competencia, tanto en acciones individuales como colectivas.

En lo que se refiere al acceso a los medios de prueba, ninguna categoría de documentos debería estar excluida *per se* de la obligación de exhibición o comunicación, pero la Directiva tendría que permitir a los jueces nacionales llevar a cabo un *test* de proporcionalidad en relación con la solicitud de exhibición de documentos y valorar las implicaciones de su comunicación, tanto para la aplicación pública como privada, en línea con lo declarado en la sentencia *Pfleiderer*. Probablemente, en la mayoría de los casos seguiría concediéndose protección a las declaraciones y solicitudes de clemencia – y por tanto esta disposición no reduciría indebidamente la efectividad de la aplicación pública –, pero excepcionalmente se concedería acceso a dichas declaraciones o a parte de la información contenida en ellas a aquellos demandantes que de otro modo no podrían ejercer acciones fundadas de indemnización por daños en materia de defensa de la competencia.

En cuanto a la coordinación de los procedimientos públicos y privados tramitados en distintos Estados miembros, se propone que la decisión firme declarativa de la existencia de una infracción que adopte una ANC constituya cuando menos una presunción *iuris tantum* de la existencia de una infracción de las normas de defensa de la competencia en el procedimiento civil que se tramite ante los tribunales de otro Estado miembro. El demandado podría refutar esta presunción acreditando, por ejemplo, que se infringe el derecho a un proceso equitativo o la existencia de un error de hecho manifiesto en la investigación. Igualmente, para evitar decisiones contradictorias debería permitirse a las ANCs, a discrecionalidad del juez nacional, actuar como *amicus curiae* ante los tribunales de otros Estados miembros, por ejemplo formulando alegaciones.

También han de precisarse en mayor detalle los plazos de prescripción para la interposición de demandas de daños por infracción de las normas de defensa de la competencia. Dado que en algunos Estados miembros ha existido cierta incertidumbre respecto del momento en el que debe entenderse que el demandante tuvo conocimiento de la infracción y del daño causado por ésta, deberían proporcionarse algunas directrices acerca de los criterios que han de valorar los tribunales al objeto de determinar éste.

En relación con las acciones colectivas, sería apropiada la introducción tanto de acciones “de representación” como colectivas. Es crucial que puedan interponerse también acciones por los particulares, al objeto de garantizar en mayor medida que las víctimas dispondrán también de un mecanismo de recurso cuando los órganos de representación, por razones de prioridad o de otro tipo, decidan no ejercer acciones. Sin embargo, debería existir la posibilidad de un modelo de “exclusión voluntaria” al menos para demandas de pequeña cuantía, a fin de asegurar el acceso a la justicia y una tutela judicial efectiva conforme al artículo 47 de la Carta de los Derechos Fundamentales de la Unión Europea. Los tribunales deberían poder decidir caso por caso en la fase de certificación si la acción colectiva debe ejercitarse sobre la base del principio de “participación voluntaria” o de “exclusión voluntaria”. Cabe sostener que en determinados supuestos podría estar justificado certificar varios sub-grupos atendiendo a motivos diferentes, por ejemplo aplicando el requisito de “participación voluntaria” a los miembros del grupo no residentes y el de “exclusión voluntaria” a los residentes.

Ello debería generalmente permitir asegurar un tamaño suficiente del grupo como para que tenga sentido el ejercicio de la acción, al tiempo que evitaría que los miembros del grupo no residentes se viesen vinculados por una sentencia en contra de su voluntad.

Igualmente, deberían proporcionarse directrices acerca de los criterios a tomar en consideración para valorar si los intereses de los miembros del grupo están adecuadamente protegidos. En particular, en acciones colectivas transfronterizas el tribunal responsable de la tramitación del asunto debería garantizar el cumplimiento de los requisitos de equidad procesal (tales como la notificación en términos razonables), así como valorar si es el foro más apropiado para tramitar la acción. En caso de que exista otro tribunal que podría tramitar el asunto de forma más eficaz, debería permitirse al tribunal encargado de la acción colectiva de resarcimiento que se declare incompetente.

Y lo que es más importante, la acción colectiva europea para casos de dimensión transfronteriza debería introducirse a través de una directiva, al objeto de mejorar el acceso a la justicia. La directiva debería regular igualmente la distribución de las indemnizaciones por daños así como el reparto de los costes entre los miembros del grupo. A pesar de que el principal objetivo habría de ser el pleno resarcimiento del daño, los daños no reclamados podrían repartirse conforme al criterio denominado “*cy pres*” (*vid. supra*), o asignarse a un fondo para la financiación de futuras acciones colectivas de indemnización. Deberán además establecerse suficientes cautelas, como limitar la obligación de reembolso de las costas a los representantes del grupo, al objeto de evitar que los miembros del grupo que verdaderamente no hayan podido excluirse en plazo tengan que abonar las costas.

En casos fundados pero de resultado incierto por su gran complejidad serían no obstante necesarios mayores incentivos para la interposición de acciones de indemnización por daños y perjuicios. Dado que los órganos de representación pueden preferir emplear sus (limitados) recursos financieros en aquellos asuntos que estiman que pueden prosperar, puede existir una cierta necesidad de abogados especializados en la interposición de demandas complejas de indemnización por daños en materia de defensa de la competencia. Sería preciso desarrollar incentivos, como el pacto de *cuota litis*, al objeto de promover esa especialización, si bien este tipo de pactos habrían de estar sujetos a aprobación judicial a fin de evitar abusos. Dado que los honorarios de los letrados

dependerían del éxito de la demanda, se verían fuertemente inclinados a aceptar únicamente aquellos casos que sea probable que prosperen. Por este motivo, deberían ser posibles también otras formas de financiación alternativa, como la financiación por instituciones financieras independientes, siempre que se eliminasen los potenciales conflictos de interés, y el importe de los daños debería estar sujeto a aprobación judicial a fin de asegurar un resultado equitativo para el grupo.

Junto con lo anterior, los tribunales deberían estar facultados para modular la regla de la imposición de las costas a la parte cuyas pretensiones se desestimen, en línea con lo dispuesto en la Directiva 2004/48/CE, al objeto de propiciar el ejercicio de demandas de indemnización por daños. Podría también permitirse a los tribunales establecer límites a las costas y ajustar los costes de litigar limitándolos a lo que se estime razonable y proporcionado. Igualmente, debería eliminarse cualquier referencia a la prohibición de daños “punitivos”, dado que el Tribunal de Justicia ha declarado que no son contrarios al Derecho de la Unión Europea.

A mayor abundamiento, la Comisión debería proporcionar algunas directrices sobre causalidad, carácter mediato o remoto, y previsibilidad, a fin de facilitar la valoración de los daños. Estos aspectos, así como la carga de la prueba y el estándar probatorio para la cuantificación del daño vienen determinados por las normas nacionales, lo que genera divergencias. En lo que se refiere a la cuantificación del daño, a pesar de que la adopción de directrices prácticas estaba justificada como un primer paso, teniendo en cuenta que el tipo y alcance del daño dependen de la concreta infracción de la normativa de defensa de la competencia y deben ser valorados caso por caso, a la luz de la experiencia de los Estados miembros debería considerarse si deben reclamarse ciertos estándares mínimos de naturaleza vinculante a escala UE.

En cuanto a la elección del modelo de puesta en práctica del instrumento de la acción colectiva, el enfoque horizontal adoptado por la actual Recomendación de la Comisión requiere mayor consideración. Es necesaria una acción colectiva europea de indemnización por daños para situaciones de daños en masa en las que se hayan vulnerado derechos reconocidos por la legislación de la Unión Europea. Una directiva parece el instrumento jurídico más apropiado, en la medida en que permitiría respetar las tradiciones jurídicas y las diferencias culturales entre los Estados miembros y

resolver los problemas constitucionales de la forma más adecuada posible, al tiempo que proporcionaría un grado suficiente de uniformidad. Pero sea cual fuere la solución por la que finalmente se optase, debería poder aplicarse de forma efectiva en la práctica.

Una acción colectiva europea podría adoptarse en virtud del artículo 81.2.f) TFUE, que permite la eliminación de obstáculos al buen funcionamiento de los procedimientos civiles, fomentando la compatibilidad de las normas de procedimiento civil aplicables en los Estados miembros cuando ello resulte necesario para asegurar el buen funcionamiento del mercado interior. Esta base legal estaría justificada en atención a la necesidad de asegurar el respeto efectivo a los derechos sustantivos reconocidos a las personas físicas y jurídicas por la legislación de la Unión y un mismo nivel de protección para dichos derechos en toda la Unión Europea. Ello evitaría a su vez ventajas competitivas para las empresas establecidas en Estados miembros en los que resulte difícil para los consumidores ejercer sus derechos. La introducción de una acción colectiva europea mejoraría igualmente el acceso a la justicia en situaciones transfronterizas, dado que en la actualidad las organizaciones de consumidores no están legitimadas en algunos Estados miembros para interponer acciones colectivas en nombre de consumidores que no sean nacionales.

De forma alternativa, podría establecerse una acción colectiva sectorial específica para indemnizaciones por daños derivados de infracciones de las normas de defensa de la competencia, que posteriormente podría expandirse a otros ámbitos en los que se hayan producido daños masivos. Esta vía sería apropiada en caso de que resulte difícil conseguir respaldo suficiente para una acción colectiva horizontal europea vinculante, y si existen dudas acerca de la necesidad de dicha acción en otros ámbitos. En cuanto a las acciones de indemnización por daños en materia de defensa de la competencia, ya ha quedado demostrada la necesidad de un acceso colectivo eficaz, en la medida en que actualmente los consumidores rara vez obtienen una indemnización por el daño sufrido. La base legal de una directiva que introdujese una acción colectiva de indemnización por daños podría ser la misma que la de Directiva sobre Acciones de Indemnización por Daños en materia de Defensa de la Competencia, i.e. los artículos 103 y 114 TFEU.

Es más: en los últimos años varios Estados miembros han introducido acciones colectivas, de modo que parece existir una voluntad política de potenciar el resarcimiento colectivo y mejorar el acceso a la justicia. Por tanto, sería cuestión de

negociar los detalles del diseño de la acción colectiva, para lo cual la actual Recomendación de la Comisión podría servir como punto de partida. El momento ideal para ello sería el año 2016, en que la Comisión evaluará la aplicación de su Recomendación sobre los Mecanismos de Recurso Colectivo. Al menos los aspectos expuestos anteriormente debería ser objeto de tratamiento a fin de hacer más eficaz el mecanismo de recurso colectivo.

C.3. Consideraciones finales

El análisis de la situación actual de la aplicación privada en la Unión Europea ilustra que, a pesar de que se ha producido un incremento de las acciones de indemnización por daños derivados de infracciones de las normas de defensa de la competencia en los últimos 5-10 años, dichas acciones fueron interpuestas fundamentalmente por empresas, y a menudo se fundaban en la existencia de una relación contractual. Por otra parte, se cree que numerosas acciones de indemnización por daños son objeto de transacción. La utilización de acciones de indemnización “como arma” es generalmente menos frecuente y, lo que resulta más preocupante, muy pocas demandas indemnizatorias son interpuestas por consumidores. De hecho, los consumidores parecen carecer de acceso a la justicia a través de mecanismos de recurso colectivo frente a infracciones de las normas de defensa de la competencia.

En los Estados miembros siguen existiendo diversos obstáculos a la interposición de demandas de indemnización por daños en materia de defensa de la competencia y existen aún notables divergencias en las normas procesales y en materia de responsabilidad aplicables a dichas acciones. A título ejemplificativo, se aplican normas y estándares divergentes en cuanto al acceso a la prueba, a la forma de los mecanismos de recurso colectivo disponibles o la financiación de las acciones indemnizatorias. Las acciones de indemnización por daños derivados de infracciones de las normas de competencia parecen concentrarse fundamentalmente en siete Estados miembros, y en especial en Alemania, los Países Bajos y el Reino Unido, mientras que la aplicación privada en materia de demandas de indemnización es bastante laxa en otros Estados miembros.

Hasta fechas recientes, la aplicación privada en la Unión Europea se ha visto potenciada fundamentalmente por la jurisprudencia del Tribunal de Justicia. El tribunal ha creado un derecho europeo a la indemnización de daños derivados de infracciones de las normas de defensa de la competencia y ha clarificado el alcance de la legitimación para la interposición de acciones de daños. Igualmente, ha establecido ciertos principios para reconciliar la aplicación pública y privada, en lo relativo al acceso a las declaraciones realizadas en el marco de una solicitud de clemencia. Sin embargo, los recientes instrumentos legislativos adoptados por la Unión Europea parecen tender a limitar los efectos de esta jurisprudencia, al conceder una clara preferencia a la aplicación pública. De hecho, suponen una armonización mucho más modesta de las normas procesales nacionales que regulan las acciones de indemnización por daños en materia de competencia de la se había previsto inicialmente durante el proceso legislativo. En particular, en lugar de introducir una acción colectiva a escala europea, la Comisión se ha limitado a recomendar a los Estados miembros que establezcan acciones colectivas y de representación. Cabe sostener que, previsiblemente, las disposiciones comunes previstas en relación con las acciones de indemnización por daños en materia de competencia, que son en su mayoría medidas mínimas de armonización, mejorarán o potenciarán fundamentalmente las posibilidades de las empresas de interponer demandas de daños en forma de acciones “de seguimiento” o derivadas fundadas en una previa decisión de la Comisión o en una decisión firme de la ANC de su Estado miembro.

Los consumidores, por su parte, serán posiblemente los grandes perdedores de esta reforma. Continuarán haciendo frente a posibilidades limitadas de acreditar el daño sufrido, así como a los elevados costes y riesgos asociados a los litigios. Las limitadas posibilidades de obtener una indemnización socavan el objetivo de asegurar la plena reparación, crear un plano de igualdad para las acciones de indemnización y remover los obstáculos al buen funcionamiento del mercado interior. En la práctica, los consumidores de los Estados miembros que faciliten la interposición de acciones colectivas eficaces tendrán más fácil obtener una indemnización y, en consecuencia, las empresas establecidas en dichos Estados miembros se enfrentarán a un mayor riesgo en materia de responsabilidad civil derivada de infracciones del derecho de defensa de la competencia.

Ello no significa que la observancia del derecho de defensa de la competencia en la Unión Europea deba hacerse depender fundamentalmente de su aplicación privada, pero ésta sí debería ser un complemento útil y creíble a la aplicación pública. El objetivo primordial de la aplicación privada debería ser la reparación del daño derivado de las conductas anticompetitivas, pero es evidente que cualquier obligación de indemnización generará potencialmente efectos disuasorios para las empresas. Tanto la aplicación pública como privada son por tanto necesarias para asegurar el cumplimiento de las normas de defensa de la competencia, pero la nueva directiva no satisface las expectativas a este respecto. Es una oportunidad perdida de mejorar sustancialmente el acceso a la justicia por parte de los perjudicados de las prácticas anticompetitivas y no garantiza el derecho fundamental a la tutela judicial efectiva consagrado en el artículo 47 de la Carta de los Derechos Fundamentales de la Unión Europea, especialmente para los consumidores. En consecuencia, la Unión Europea debería tratar de abordar este asunto llevando a cabo una revisión o transformación en profundidad de las normas reguladoras de las acciones de indemnización por daños en materia de defensa de la competencia, en línea con las propuestas que se formulan en esta tesis, en el año 2020 cuando la Directiva será revisada.

1. INTRODUCTION

Antitrust rules play an important role in the market economy by ensuring a certain level playing field for the market players and by contributing to consumer welfare, for instance, in the form of a wider selection and better quality of products and services at lower prices given that these rules promote effective competition and an efficient allocation of resources. In addition, in the European Union context, the antitrust rules are indispensable in order to accomplish a functioning internal market and the integration of European economies.

As to the *enforcement* of the antitrust rules, a distinction can be made between public and private enforcement. Competition authorities are usually entrusted with the *public enforcement* of the antitrust rules and pursue anti-competitive conduct that is the most harmful to the economy as a whole. In general, breaches of the antitrust rules result in competition authorities (or courts upon the proposal of the competition authorities) imposing fines¹ on the infringing companies. But in some countries, such as the United States,² the United Kingdom³ and Ireland,⁴ criminal sanctions⁵ are also possible.

* The Spanish title of this thesis was registered before the Lisbon Treaty entered into force. The English title “Private Enforcement of EU Antitrust Rules in Light of the U.S. and Canadian Experience: The Case for Harmonization” reflects the change brought about by the entry into force of the Lisbon Treaty following which the European Union has replaced and succeeded the European Community, thereby making it necessary to replace any reference to the “EC” by “EU”.

¹ Apart from fines, the competition authorities may also impose structural remedies or other measures or constraints if they are available under national procedural law. See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 6.

² In the United States, any contract or engagement in any combination or conspiracy declared illegal by Section 1 of the Sherman Act shall be deemed guilty of a felony and can be punished by imprisonment up to 10 years. Alternatively, a fine not exceeding \$100,000,000 can be imposed on a corporation or a fine not exceeding \$1,000,000 can be imposed on any other person. It is also possible to combine both punishments. 15 U.S.C. § 1. Under Section 2 of the Sherman Act, the punishments are the same for monopolization, or the attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States. 15 U.S.C. § 2.

³ In the United Kingdom, a person who has committed a cartel offence, i.e. who is guilty of price-fixing, market-sharing, bid-rigging or limitation or prevention of production or supply in the United Kingdom, (see Enterprise Act 2002, section 188) can be imprisoned for a maximum of five years or be liable to a fine, or both, see Enterprise Act 2002, section 190.

⁴ Pursuant to section 8(1)(b)(ii) of the Irish Competition Act 2002, an individual guilty of an offense under section 6 of the Competition Act, i.e. who has entered into, or implemented, an agreement, or has made or implemented a decision, or has engaged in a concerted practice prohibited by Article 81(1) EC [now Article 101(1) TFEU] or by its Irish equivalent, section 4(1) of the Irish Competition Act 2002, can be convicted to imprisonment for a term not exceeding 5 years. Alternatively, a fine not exceeding €4,000,000 or 10 per cent of the turnover of the individual in the financial year ending in the 12 months

Moreover, in certain jurisdictions, fines⁶ and disciplinary sanctions⁷ can be imposed on individuals. For example, in Spain, it is possible to impose a fine of up to 60,000 Euros on each of the legal representatives of the infringing undertaking or on the persons that comprise the management bodies that have participated in the anti-competitive agreement or decision.⁸ In the United Kingdom, a director of an undertakings which has breached competition law can be disqualified by a court if his conduct as a director makes him unfit to be concerned in the management of a company.⁹

Private enforcement of antitrust rules, in turn, refers to the application of antitrust rules by courts when they declare anti-competitive agreements null and void, grant injunctions, and award damages on the basis of actions brought by the victims of antitrust violations. Private enforcement is also usually the only manner to compensate victims of antitrust violations, since public enforcers can only impose fines (and in certain cases criminal and/or disciplinary sanctions) on the infringers but cannot, in general, award damages to the victims.¹⁰

The United States has opted for an enforcement model that is mainly (approximately 90%)¹¹ based on private enforcement of the antitrust rules, whereas the situation is the opposite in the EU where the enforcement is principally carried out by the public competition authorities, and private actions only account for a comparatively small part

prior to the conviction, whichever of the amounts is the greater, can be imposed on the individual or he can be subject to both such fine and imprisonment (not exceeding 5 years).

⁵ Criminal sanctions mainly refer to imprisonment. For the discussion on whether the fines imposed by the Commission are of criminal law nature, see WILS, W.P.J., *The Optimal Enforcement of EC Antitrust Law. Essays in Law & Economics*, Kluwer Law International, The Hague, 2002, at p. 226-230.

⁶ This is the case, for instance, in the United States. See note 2, *supra*.

⁷ Disciplinary sanctions refer to disqualification orders, for example, barring the persons concerned from holding a position as corporate director. See WILS, W.P.J., *The Optimal Enforcement of EC Antitrust Law. Essays in Law & Economics*, Kluwer Law International, The Hague, 2002, at p. 222.

⁸ Article 63(2) of Competition Act 15/2007.

⁹ Enterprise Act 2002, section 204, which amended the Company Directors Disqualification Act 1986.

¹⁰ However, sometimes public competition law enforcers may take into account the injury that victims of an antitrust violation have suffered and oblige the infringer to compensate them, for example, through an informal settlement. Moreover, for instance, in France, under Article L442-6 of the Commercial Code, the competition authority may claim damages on behalf of the victims. See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 8, note 32.

¹¹ See LANDE, R.H., “Benefits of private enforcement: empirical background” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

of the enforcement.¹² However, the interest in enhancing private enforcement of the antitrust rules in the EU has been growing,¹³ and in April 2014 the first piece of harmonizing legislation¹⁴ was adopted by the European Parliament, although it still requires final approval from the Council of Ministers. As the United States is frontrunner in antitrust law and has a long experience of antitrust enforcement, Europe could learn valuable lessons from the United States. Nevertheless, judging on the Directive on Antitrust Damages Actions, it appears that the EU legislator has not fully seized this opportunity, as will be demonstrated in this thesis.

Annually antitrust violations cause significant damage to the European economy. In year 2007, it was estimated that the yearly costs for the economy of price-fixing and market-sharing EU-wide cartels alone would amount to between 13.4 and 36.6 billion

¹² It has been estimated that antitrust damages actions account at most for 10% of antitrust enforcement in the EU. See CENTRE FOR EUROPEAN POLICY STUDIES, ERASMUS UNIVERSITY ROTTERDAM and LUISS GUIDO CARLI “*Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*”, Report for the European Commission, Contract DG COMP/2006/A3/012, Brussels, Rome and Rotterdam, December 21st, 2007, at p. 28. However, arguably, there is reason to believe that, in some Member States, they account for a more modest part of antitrust enforcement. For instance, there have only been a handful of damages actions in Finland, although the damages claims arising from the *Asphalt Cartel* have increased the number of claims due to the involvement of numerous parties. See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingon korvaus*, Edita, Helsinki 2010, at p. 129. and 133. It should also be borne in mind that a number of cases are settled and, therefore, the information publicly available might not always reflect the situation exhaustively. For instance, in the United Kingdom, a majority of antitrust disputes are settled out of court. See e.g. RODGER, B.J., “Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005”, *E.C.L.R.*, Volume 29, Issue 2, 2008, p. 96-116, at p. 97.

¹³ For example, the European Commission has adopted a Green Paper and a White Paper on antitrust damages actions, and has held a public consultation on collective redress. See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, and Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, 4.2.2011. At national level there have also been developments. For instance, the UK Government has decided to introduce stand-alone and follow-on collective actions before the Competition Appeal Tribunal, which would decide on whether the collective action should be brought as an opt-in or opt-out action. See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 31-32 and also refer to Chapter 3 of this thesis.

¹⁴ Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (hereinafter “Directive on Antitrust Damages Actions”), see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>. On June 11th, 2013, the Commission also issued recommendations on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of the rights granted under Union law. See 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

of euros.¹⁵ If the impact of domestic cartels were also added, the yearly costs would be between 25 and 69 billion of euros, which would correspond to 0.20-0.55% of the GDP of the EU in 2011.¹⁶ It should be noted that this number does not include the costs of other types of antitrust violations, such as the abuse of a dominant position, so the aggregate damage of antitrust violations to the economy is, in fact, much higher. Thus, it would be crucial to deter antitrust violations. This is even more important today when the global economy is still severely affected by the financial crisis.

Nevertheless, at present it seems that the enforcement of the antitrust rules in the EU is not sufficiently effective, and the fines imposed on the infringers do not alone have a deterrent effect since the number of (at least uncovered) cartels seems to have remained essentially similar in the 21st century.¹⁷ The European Commission (hereinafter “the Commission”) has attempted to remedy this by amending its fining policy,¹⁸ and has been examining how the private enforcement of the EU antitrust rules could contribute to increase the deterrence of antitrust violations,¹⁹ which has resulted in the adoption of the Directive on Antitrust Damages Actions.

¹⁵ See CENTRE FOR EUROPEAN POLICY STUDIES, ERASMUS UNIVERSITY ROTTERDAM and LUISS GUIDO CARLI “*Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*”, Report for the European Commission, Contract DG COMP/2006/A3/012, Brussels, Rome and Rotterdam, December 21st, 2007 (hereinafter “External Impact Study”), at p. 107.

¹⁶ See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 22.

¹⁷ See statistics on cartel cases decided by the European Commission between 2000 and 2012 available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁸ See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1.09.2006, p. 2-5. According to the Guidelines, the basic amount is now calculated on a proportion up to 30% of the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. This amount is then multiplied by the number of years of participation in the infringement, thus reflecting more the duration of the infringement and resulting in higher fines than under the previous guidelines. The fines for cartels are also increased because of the introduction of so-called “entrance fees” for such infringements. Similarly, the fines in cases involving recidivism will increase the basic amount of the fine by 100%. See paragraphs 13, 21, 24, 25 and 28 of the Guidelines.

¹⁹ As stated in Note 13, on December 19th, 2005, the Commission adopted a Green Paper on Damages actions for breach of the EC antitrust rules and, on April 2nd, 2008, a White Paper on Damages actions for breach of the EC antitrust rules. See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005 and Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

Initially, one of the reasons advocated for enhancing private enforcement was the idea that if companies were not only obliged to pay a fine for the antitrust violation, but also had to compensate the damages that they have caused to victims, the risk of facing large damage claims could serve to deter companies from committing the violations in the first place. Increased private antitrust enforcement would thus enhance deterrence and strengthen the compliance with antitrust rules.²⁰ However, it should be noted that the recent Directive is rather emphasizing the compensatory function of private enforcement as it does not refer to the deterrent effect of damages actions,²¹ although liability in damages will, arguably, at least have an indirect deterrent effect on future infringers, provided that the amount of damages to be paid is considerable. The compensatory function of private enforcement is important in that it is usually the only way for victims to obtain compensation for the loss that they have suffered since, in general, public enforcement of antitrust rules can only put an end to the infringement and impose sanctions on the infringers, but cannot award damages for the harm suffered.

Private enforcement serves also to ease the burden on competition authorities, which have limited resources and only prosecute conduct that is deemed to be most harmful to the economy as a whole. Its role is thus complementary to public enforcement, and it makes it possible for private individuals to take actions when competition authorities cannot or will not. This is particularly important in cases involving abuse of a dominant position or vertical competition restraints as the competition authorities are less active in these types of infringements due to priority reasons, or because they are not aware of these practices.²² Consequently, it would be important to enhance private enforcement in order to foster compliance with the antitrust rules in general and increase consumer welfare.

²⁰ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 16.

²¹ See Directive on Antitrust Damages Actions the aim of which is to ensure the effective enforcement of the EU competition rules by optimizing the interaction between public and private enforcement of competition law and ensuring that victims of EU antitrust violations can obtain full compensation for the harm they have suffered.

²² See BÖGE, U., “Up and Running, or is it? Private enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 198.

Furthermore, as the Commission has pointed out, enhanced private antitrust enforcement would ultimately also contribute to ensuring open and competitive markets in the EU internal market given that it would help ensuring a level playing field for companies in the EU by keeping private barriers to competition in check.²³

1.1. Objectives and Scope

1.1.1 Objectives

The main objective of this thesis is to establish what measures would be required to ensure the effective private enforcement of antitrust rules in the EU, and to suggest how they should be implemented. As the law stands today (before the implementation of the Directive on Antitrust Damages Actions), the relevant national procedural rules are very divergent, and these procedural divergences increase the risk of differences in treatment and lead to legal uncertainty as it is more difficult for the victims and defendants to foresee the outcome of an action.²⁴ Moreover, the low number of antitrust damages actions that have been brought to date in the EU in particular by consumers²⁵ suggests that the current system of private enforcement is not working satisfactorily. For instance, the burden of proof in damages actions is high but, at the same time, the access to evidence tends to be limited.²⁶ Proving an infringement of the antitrust rules and the causal relationship between that infringement and the harm suffered is therefore a very complex task. This appears to be a result of inadequate national tort rules of legal or procedural nature that do not take into account the specificities of antitrust damages actions.²⁷ As a consequence, it is probable that a considerable number of victims of antitrust violations are left without compensation of the harm that they have suffered and, accordingly, many infringers are able to keep their illegal gains.

²³ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 7.

²⁴ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

²⁵ See AHRC Research Project on EU Competition Law: “*Comparative Private Enforcement and Collective Redress in the EU 1999-2012*” Conference on September 15th 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>, which concluded that there have been almost no small value mass consumer antitrust damages claims.

²⁶ See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 5.

²⁷ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

Thus, the first objective of the thesis is to establish what procedural rules would need to be modified in order to remedy the current under-enforcement of antitrust rules through private actions. Therefore, the first part of the thesis aims to analyze the existing obstacles to private enforcement in the EU in general and then in the United Kingdom, Germany, France, Spain, Sweden and Finland, in particular, in an attempt to outline differences in those systems, and to define what obstacles to private enforcement should be remedied in order to facilitate antitrust damages actions.

This thesis also aims to determine to what extent the purpose of private enforcement should be to compensate victims of antitrust violations as well as to deter infringers from violating the antitrust rules in the future. This determination is crucial as the need to enhance private enforcement and the measures required to achieve that will depend on whether the aim is only to compensate the victims, or also to deter future antitrust violations. A fundamental question is therefore what should be the desired balance between public and private antitrust enforcement and, accordingly, how to ensure that enhanced private enforcement will not have a negative effect on public enforcement of the antitrust rules.

The second objective is to analyze the recent EU legislative instruments to enhance private enforcement: the Directive on Antitrust Damages Actions²⁸ and the Recommendation on Collective Redress Mechanisms.²⁹ The purpose is to demonstrate the flaws and limitations of the reform, and to determine the additional issues that would also require a harmonization or approximation. The thesis aims to show that the Directive is not likely to revolutionize the possibilities of victims of antitrust violations obtaining compensation for the harm that they have suffered. On the contrary, in particular consumers will be left at the mercy of consumer organizations (which often suffer problems of funding) and, in addition, will most likely have to rely on so-called follow-on actions, i.e. damages claims will only be realistically possible after the competition authorities have first established an infringement of the EU competition

²⁸ Directive on Antitrust Damages Actions certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

²⁹ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

rules. The legislative measures will therefore be critically assessed in light of experiences from a number of different jurisdictions, and suggestions will be made as to how to improve them.

Given that private enforcement of antitrust rules plays a remarkably more significant role in the United States,³⁰ and is also increasing in Canada,³¹ the third objective of the thesis is to examine especially what lessons could be learned from the U.S. and Canadian experiences of private antitrust enforcement. In particular, the focus will be on the role of class actions, contingency fees, and discovery in strengthening private enforcement since these features are distinctive of the private enforcement model in the United States and in Canada. The aim is to use the U.S. and Canadian experiences to establish what in the U.S. and Canadian antitrust enforcement model works successfully as well as what the drawbacks of these models are. Based on that analysis, the thesis aims to first establish whether there is a call for introducing class actions or other forms of procedural devices available in the U.S. and Canadian legal systems in the EU in order to enhance private enforcement, and then to define the possible obstacles to introducing such enforcement mechanisms in the EU, once they have been adapted to the European legal systems and traditions.

The last objective of the thesis is to establish the optimal way of improving private enforcement. Hence, the final part of the thesis will focus on what issues must be regulated in a uniform way in addition to those included in the Directive on Antitrust Damages Actions, and how the harmonization of these rules should be implemented. Central questions for the research are, for example, whether collective actions and contingency fees should be introduced in the EU as these have been excluded from the Directive on Antitrust Damages Actions. The thesis will examine whether a partial or total harmonization of these rules is required, or whether developing best practice rules or issuing Union guidelines would be a more appropriate manner to enhance private

³⁰ See LANDE, R.H., “Benefits of private enforcement: empirical background” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

³¹ For instance, class actions in cartel cases have become more frequent. See WRIGHT, C.M. and BAER, M.D., “Price-fixing Class Actions: A Canadian Perspective”, *Loy. Consumer L. Rev.*, 16, 2004, p. 463-478, at p. 463 and HUTTON, S., “Chapter 3. Canada” in KNABLE GOTTS, I., (ed.), *The Private Competition Enforcement Review*, 2nd edition, Law Business Research, London, 2009, p. 30-49, at p. 30.

enforcement. Similarly, it is necessary to determine whether a sector-specific harmonization limited to antitrust cases or a harmonization of civil procedural rules in general is to be preferred. Furthermore, the appropriate legal instruments for implementing the harmonization will be determined, and the existence of a legal basis for Union action will be verified. Finally, the feasibility and the expected implications of the harmonization will be assessed.

In short, this thesis aims to demonstrate that the new Directive on Antitrust Damages Actions is a missed opportunity to improve access to justice in cases involving infringements of the EU competition rules, and the common rules proposed will not be sufficient to ensure the effective and uniform enforcement of the Union right to compensation for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”). In particular, the Directive will do little to improve redress for consumers, the ultimate victims of antitrust violations.

1.1.2 Scope

As to the scope of the thesis, the focus will be on the legal aspects of antitrust enforcement since the thesis is first and foremost a doctoral thesis in law. In other words, the thesis will not include any in-depth economic analysis, but economic analysis will only be conducted to the extent that it is indispensable for the development of the argument in question. However, it is important to note that economic analysis is an essential and inherent part of antitrust enforcement, since the application of the EU antitrust rules involves an economics-based analysis of the effects of potential competition restrictions in order to determine whether the positive effects outweigh the negative effects of the restrictions in question or, on the contrary, result in consumer harm.³² Moreover, antitrust violations the effects of which on the EU economy or the economies of the Member States are only minor will, in general, not be pursued by the

³² See the Guidelines on Vertical Restraints, *OJ C* 130, 19.5.2010, p. 1-46, at paragraphs 122-127, and Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, *OJ C* 11, 14.1.2011, p. 1-72, at Recital 20. For a summary of the main principles of the economics or effects-based approach to Article 102 TFEU, see “Antitrust: consumer welfare at heart of Commission fight against abuses by dominant undertakings” IP/08/1877, Brussels, December 3rd, 2008, available at http://europa.eu/rapid/press-release_IP-08-1877_en.htm?locale=en.

competition authorities,³³ although it would, in principle, be possible to enforce them through private actions before the national courts. Consequently, the economics-based approach will always be borne in mind in assessing the existing possibilities of bringing antitrust damages actions, and different options for enhancing private enforcement of the EU antitrust rules.

The civil sanction of nullity of contracts violating the EU antitrust rules as well as the possibility of applying for injunctions also fall outside the scope of this thesis, since the research questions concern the conditions for bringing antitrust damages actions, and how to proceed in order to enhance redress for the victims of antitrust violations by compensating them for the loss that they have suffered as a result of the violations in question.

Similarly, antitrust damages actions decided by arbitrators are excluded from the scope of the thesis because arbitral bodies are not necessarily considered as “courts” under EU law even if they give judgments according to law and the award is binding between parties, but a closer link between the arbitration procedure and the ordinary court system is required.³⁴ Moreover, arbitration is usually a voluntary form of deciding commercial disputes, unless the contract in question includes a clause requiring that possible disputes must be submitted for arbitration. Because of the high degree of party autonomy, the parties may use customized rules, or choose institutional arbitration rules that suit their needs and expectations.³⁵ This makes it more difficult to influence on arbitration by the means of the adoption of binding legal rules. Moreover, arbitration

³³ The Commission is entitled to refer to the Union interest in order to determine the degree of priority to be applied to the various cases brought to its attention and it may decide not to investigate a case if there is insufficient Union interest to justify further investigation. *See* Judgment of 18 September 1992, *Automec v Commission*, Case T-24/90, ECR, EU:T:1992:97, paragraph 85.

³⁴ *See* Judgment in *Nordsee v Reederei Mond*, C-102/81, EU:C:1982:107, paragraphs 10-13, and CRAIG, P. and DE BÚRCA, G., *EU Law. Text, Cases and Materials*, 5th edition, Oxford University Press, Oxford New York, 2011, at p. 446. However, if public authorities are involved in arbitration, the arbitrators might be considered as courts. *See* Judgment in *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening*, C-109/88, EU:C:1989:383, paragraphs 7-8, where the European Court of Justice held that a Danish Industrial Arbitration Board was considered as a court for the purpose of Article 267 TFEU because the board’s jurisdiction over disputes between parties to collective agreements did not depend upon the parties’ agreement, but were subject to the Agreed Standard Rules adopted by the Employers’ Association and Employees’ Union. Moreover, those rules governed the composition and procedure of the Industrial Arbitration Board, and its decisions were final.

³⁵ *See* ZEKOLL, J., “Comparative Civil Procedure” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 1327-1362, at p. 1348.

law falls under the competence of the Member States, which makes it challenging to determine the boundaries between substantive EU law (including EU competition law), on the one hand, and national law and the principle of procedural autonomy, on the other hand.³⁶ In addition, it is even more complicated to find reliable statistics on cases that have been dealt with by the means of arbitration than damages actions brought before the national courts of the Member States due to the private nature of disputes solved by arbitration.

Finally, with regard to the analysis of private enforcement models in the six selected Member States (i.e. the United Kingdom, Germany, France, Spain, Sweden and Finland), the United States and Canada, the thesis will only examine the main features of the selected legal systems, but does not intend to conduct an in-depth analysis of the legal systems concerned. Instead, the focus will be on the issues that are closely linked to the research topic and the underlying hypotheses.

1.2. Structure

The thesis will consist of an introduction (Chapter One), a chapter on the background of the research project and the state of the art in the field (Chapter Two), Part One “*The Flaws in the EU Private Antitrust Enforcement Model and the Need for Harmonization*” (Chapter Three), Part Two “*The Flaws and Missing Pieces of the Current Reform*” (Chapters Four and Five), Part Three “*Enhancing Private Enforcement of the EU Antitrust Rules by Learning from the U.S. and Canadian Experiences*” (Chapters Six and Seven), and conclusions (Chapter Eight).

Chapter One (“*Introduction*”) will define the research questions and outline the research topic. It will define the objectives and scope of the thesis, and present the structure of the thesis. It will explain the justification for and the value of conducting a legal comparison, and present the methodology and the sources used in the thesis. Chapter Two (*Background of the Research Project and the State of the Art in the Field*) will, in turn, explain the background of private enforcement in the European Union by

³⁶ See IDOT, L., “*The Role of Arbitration in Competition Disputes*” in LIANOS, I and KOKKORIS, I, *The Reform of EC Competition Law. New Challenges*, Kluwer Law International, Alphen aan den Rijn, 2010, p. 75-94, at p. 75.

referring to initiatives at the Union level, such as the Commission Green Paper³⁷ and White Paper on Damages action for breach of the EC antitrust rules,³⁸ the recent Directive on Antitrust Damages actions,³⁹ and the Recommendation on Collective Redress Mechanisms,⁴⁰ and to the most important case law in this field.

Part One (“*The Flaws in the EU Private Antitrust Enforcement Model and the Need for Harmonization*”) will examine the existing obstacles to private enforcement in the EU. Chapter Three (*Obstacles to Private Enforcement in the EU*”) will therefore contain an analysis of the state-of-play of private enforcement in the EU in general and the obstacles to antitrust damages actions, in particular. It will then briefly analyze the situation in the United Kingdom, Germany, France, Spain, Sweden and Finland with a view to outlining differences in those systems and establishing the challenges to be met in this field as well as the problems that must be remedied in order to enhance private enforcement of the EU antitrust rules.

Part Two of the thesis (“*The Flaws and Missing Pieces of the Current Reform*”) will focus on the reforms included in the recent legislative measures in areas relevant to private enforcement of the EU antitrust rules. First, Chapter Four (*Directive on Antitrust Damages Actions*) will explain and critically assess the measures included in the Directive by comparing them to earlier proposals made by the Commission. It will also identify the missing pieces of the reform. Chapter Five (“*The Commission Recommendation on Collective Redress Mechanisms*”) will then proceed to analyze the recommendations issued by the Commission on collective redress mechanisms in Member States concerning violations of rights granted under Union Law. The purpose is to determine the main flaws of the Recommendation and the issues that should be modified in order to contribute to enhanced private enforcement.

³⁷ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005.

³⁸ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

³⁹ Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *see* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

⁴⁰ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

Part Three (*“Enhancing Private Enforcement of the EU Antitrust Rules by Learning from the U.S. and Canadian Experiences”*) will examine the U.S. and Canadian experiences in order to draw lessons that could serve as inspiration for a reform of the EU private enforcement model. Chapter Six (*“Drawing Lessons from the U.S. and Canadian Experiences”*) will analyze private antitrust litigation in the United States and Canada. In particular, the use of class actions and the availability of pretrial discovery, treble damages and contingency fees will be examined as they are common in the United States and, therefore, could also serve as a model in order to reform the private enforcement system in the EU. The Canadian enforcement model is of added interest, first, because it does not include all, but only some of the features of the U.S. model, thus offering an interesting point of reference for a private enforcement model going further than the current EU model, but not as far as the U.S. model. Second, the coexistence of Civil Law and Common Law systems in Canada could give valuable insights on how to reform the procedural rules governing antitrust damages actions in the EU in a manner that respects both the Civil Law and Common Law legal traditions. Based on the analyses of the U.S. and Canadian enforcement models, Chapter Six then aims to establish what lessons could be learned from the U.S. and Canadian experiences, and whether there would be a call for introducing some of the procedural devices available in those jurisdictions in the EU. It will consider the relevance of the U.S. and Canadian experiences for the private enforcement in the EU by outlining the legal and cultural differences between the U.S., Canadian and European legal systems and traditions.

Chapter Seven (*“The Case for a More Comprehensive Harmonization: A Proposal for Enhancing Private Enforcement of the EU Antitrust Rules in Light of the U.S. and Canadian Experiences of Private Enforcement”*) will define the issues, which require to be regulated in a uniform way in order to remedy the current under-enforcement of the EU antitrust rules through private actions, and will outline how these issues should be regulated. It will draw on the U.S. and Canadian experiences in proposing measures that could contribute to a more effective private enforcement of the EU antitrust rules than those currently included in the reform. It will attempt to demonstrate that the most efficient manner would be a further harmonization of certain procedural rules governing antitrust damages actions, and the introduction of European collective actions, and will

suggest how this harmonization should be implemented. It will examine to what extent a partial or total harmonization would be required, and define the issues which it would be more appropriate to develop by introducing some form of best practice rules or issuing Union guidelines. Similarly, it will determine whether sector-specific collective actions or introduction of collective actions of a more general nature should be preferred. It will define the appropriate legal instruments for implementing the harmonization, and will assess the feasibility of the harmonization. In this context, the legal and cultural backgrounds of the EU Member States as well as the existence of a political will among the Member States will be assessed.

Finally, Chapter Eight (“*Conclusions*”) will include a summary of the main findings of the thesis, and will also evaluate the likely-hood that the proposed harmonization could be politically achieved. It will also contain a brief analysis of the expected implications of a harmonization. In addition, it will include recommendations on what actions should be taken next, and an outlook towards the future.

1.3. Methodology and Sources

1.3.1. Methodology

This thesis aims first to establish the flaws in the EU private enforcement model and then to suggest remedies at the Union level by learning from the U.S. and Canadian experiences of private antitrust enforcement.

In order to analyze the state-of-play of private enforcement of the antitrust rules in the EU, the starting point for the research will be the Directive on Antitrust Damages Actions, although the chronological starting point would be the Commission Green Paper and White Paper on Antitrust Damages Actions.⁴¹ The objective is to analyze the obstacles to private enforcement in the EU, and to complement it with an analysis of the relevant EU case law as well as various studies conducted on private enforcement and

⁴¹ Similarly, the Commission Staff Working Papers accompanying the Green paper and the White paper will be analyzed: Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005; Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008; and Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008.

collective redress which have been commissioned by the Commission.⁴² An in-depth analysis will then focus on a number of selected Member States. These will include Germany as a representative of the Germanic legal system, France and Spain of the Romanic legal family, Sweden and Finland representing the Nordic legal traditions, and the United Kingdom as a representative of the Common Law system, and one of the European countries traditionally closest to the U.S. and Canadian legal systems.

The methodology used will be comparative. The aim is to identify what forms of redress are available for victims of breaches of antitrust rules. First, the relevant legal provisions and literature in the field as well as the most relevant case law will be analyzed. Based on the findings of this analysis, the similarities and differences in the Member States will be critically compared. Next, the Directive on Antitrust Damages Actions and the Recommendation on Collective Redress Mechanisms by the Commission which aim, *inter alia*, to enhance private enforcement will be presented, and critically assessed in order to determine their flaws and limitations, and how they should be modified so as to address the problems with the current private enforcement model.

⁴² The proposals for legislative initiatives (including soft law) encompass the failed Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty which was never officially published nor adopted, *see* Annex III of LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014; the Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013; 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65; Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union; Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union; and Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, 4.2.2011. The studies include the External Impact Study; STUDY CENTRE FOR CONSUMER LAW – CENTRE FOR EUROPEAN ECONOMIC LAW, KATHOLIEKE UNIVERSITEIT LEUVEN, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings”, Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B – Consumer Affairs, Leuven, January 17th, 2007; OXERA, “Quantifying antitrust damages. Towards non-binding guidance for courts”, Study prepared for the European Commission, December 2009; and BUCCIROSSI, P., CARPAGNANO, M., CIARI, L., TOGNONI, M. and VITALE, C., “Collective Redress in Antitrust” Study, IP/A/ECON/ST/2011-19, June 2012.

In order to find an optimal private enforcement model, inspiration will be sought from the U.S. and Canadian experiences. The presumption will be that the U.S. private enforcement model, accounting for the major part of the total antitrust enforcement in the United States,⁴³ will also have something to offer the EU model. Due to the long and extensive experience of private enforcement of antitrust rules in the United States, there is, arguably, a call to assess the U.S. experience in order to establish the advantages and drawbacks of the American model and possible obstacles to introducing such a model in the EU, provided that it is first adapted to the European legal and cultural traditions. As a basis for this analysis, case law and applicable statutory provisions at both federal and state level will be used. However, the focus will be on federal law as it is applicable throughout the United States. Only when significant differences exist between federal and state law, will an analysis of state law be included.

Canada, in turn, has – from a European point of view – a more moderate model of private enforcement than the United States. For instance, it does not provide for treble damages, and the majority of antitrust cases are decided by judges, not juries.⁴⁴ Moreover, the Canadian class action is based on an opt-out model as the U.S. class action, but discovery rights are less extensive than in the United States.⁴⁵ As stated, the coexistence of Civil Law and Common Law systems in Canada also makes the Canadian legal system interesting from a European perspective as some EU Member States belong to the Common Law legal family, and it is therefore necessary to create a private enforcement model which is compatible with both Common Law and Civil Law legal traditions. Consequently, useful lessons could be learned from the Canadian experience as well. The focus will be on those aspects that differ from the features of the U.S. legal system. In other words, the U.S. enforcement model is taken as a point of reference, whereas the Canadian model is merely used to complement that analysis when it provides added value.

⁴³ See LANDE, R.H., “*Benefits of private enforcement: empirical background*” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

⁴⁴ See WATSON, G. D., “Class actions: the Canadian experience, *Duke J. Comp. & Int’l L.*, 11, Spring/Summer 2001, p. 269-287, at p. 269.

⁴⁵ See OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, Policy Roundtables, “*Private Remedies*”, 2007, DAF/COMP(2006)34, January 11th, 2008, at p. 373.

In addition, when conducting a comparative research not only legislative rules, judicial decisions, the “law in the books” and general conditions of business, customs, and practices should be taken into account, but “*everything whatever which helps to mould human conduct in the situation under consideration*”.⁴⁶ This means that e.g. cultural differences, such as the fact that the United States is traditionally “more litigious”, should be considered too. Furthermore, it might not be possible to implement without modifications the alternatives available in the United States and Canada in the EU due to differences in court proceedings or the social context. In particular, in opting for a certain solution, the context of private enforcement in the EU should always be kept in mind when assessing the implications of the remedy chosen.

This thesis will propose concrete measures that need to be adopted in order to enhance private enforcement in the EU. In this context, the Directive on Antitrust Damages Actions will be taken as a starting point to which modifications and additions will be proposed. The thesis will examine whether a modification of the applicable procedural rules would require a harmonization, and what the risks and advantages of a harmonization would be. The alternatives to a harmonization will also be analyzed as well as the advantages and drawbacks of the other options. The final step will be to set out how the harmonization should be implemented, i.e. whether it should be a partial or total harmonization of the procedural rules governing antitrust damages actions, and to what extent it should be adopted through binding Union legal instruments instead of implemented on a voluntary basis in the form of guidelines and best practices.

1.3.2. Justification for and Value of a Legal Comparison

At different points in history, jurisdictions in different parts of the world have adopted legal rules from other jurisdictions⁴⁷ either voluntarily or involuntarily. Often the transfer of legal rules has been made by national legislators, but courts have also actively been inspired by legal rules and ideas from other jurisdictions in deciding similar kinds of cases or problems not finding solution in the domestic legal order. The

⁴⁶ See ZWEIGERT, K. and KÖTZ, H., *Introduction to comparative law*, 3rd revised edition, Clarendon Press, Oxford, 1998, at p. 11.

⁴⁷ For example, the reception of Roman law in Europe and the influence of the French Civil Code in other civil law counties in Europe and other jurisdictions. See DE CRUZ, P., *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, London, 2007, at p. 511.

effect of the transfer of a legal rule will, however, depend on the historical, political, social, religious and cultural context, including the legal culture of the country in question.⁴⁸ Moreover, legal transplants tend to occur with modifications in order to avoid that they are incompatible with existing domestic procedural structures and preferences.⁴⁹

The comparison of two or more legal systems may be challenging because of a number of reasons: linguistic and terminological problems, cultural differences, the tendency of comparatists to impose their own legal conceptions and expectations on the systems under examination, the exclusion of extra-legal rules, to name some of the difficulties.⁵⁰ However, this does not exclude the possibility of learning from another jurisdiction, and using a legal rule or mechanism as inspiration in order to improve the functioning of the domestic legal system, since the manner in which the foreign legal system regulates a particular issue may be as effective or more so to ensure norm enforcement. The conditions for conducting a legal comparison depend, nevertheless, on a number of issues, such as the level of similarity of the systems compared and the availability of materials. The comparison will be facilitated the more similar the two legal systems compared are.⁵¹

As to the method of comparative research, as a starting point, it is useful to describe the norms, concepts and institutions, or legal problems and legal solutions provided. The comparison must focus on those issues in the foreign legal systems which fulfill the same functions, in other words, the issue under examination must not be analyzed in the light of domestic legal concepts, but the focus must be on a concrete legal problem.⁵² Then the differences and similarities should be identified, and the reasons for the similarities and differences between the systems should be explained. It is of particular

⁴⁸ See DE CRUZ, P., *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, London, 2007, p. 510-512.

⁴⁹ See ZEKOLL, J., "Comparative Civil Procedure" in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 1327-1362, at p. 1357.

⁵⁰ For a more extensive list and a description of the dangers which comparatists face, see DE CRUZ, P., *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, London, 2007, p. 219-231.

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⁵² See ZWEIGERT, K. and KÖTZ, H., *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, 3rd revised edition, J.C.B. Mohr (Paul Siebeck), Tübingen, 1996, at p. 33.

importance to determine how they influence legal decisions and the interaction of legal actors.⁵³ In outlining the possible answers to the problems, the different approaches should be compared. In this context, it is important to take into consideration the impact of possible cultural differences (and socio-economic factors), and any other non-legal factors (e.g. local customs) that may have influenced the legal position in the jurisdictions compared. Relevant research questions are how does the rule really operate in practice and why? Are there, for instance, cultural reasons, economic practices, or certain trade practice which explain the operation of the rules? Next, the legal principles should be critically analyzed in terms of their intrinsic meaning, and conclusions should be drawn within a comparative framework (with possible caveats) and with critical commentary. It should also be related to the original purpose of the study.⁵⁴ The critical assessment entails studying the different solutions from a new and common perspective, focusing on the functionality of the solutions.⁵⁵ Finally, it would be necessary to indicate the relative importance given to the nature of the systems being examined, their parent legal family, their historical or socio-cultural development, and the possible repercussions of these developments on the legal development of the rule/solution in relation to other legal systems.⁵⁶

Regarding comparative competition law more specifically, there is no specific methodology or body of works that could serve as a common reference point for research,⁵⁷ and there is also no international standard for competition law. Nevertheless, the United States tends to serve as a valuable common reference point thanks to its considerable number of cases spanning over a century, and the fact that more factual material is often contained in its judicial opinions than what is available in other legal

⁵³ See GERBER, D.J., “Comparative Antitrust Law” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 1193-1224, at p. 1194.

⁵⁴ See DE CRUZ, P., *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, London, 2007, p. 244-245.

⁵⁵ See ZWEIGERT, K. and KÖTZ, H., *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, 3rd revised edition, J.C.B. Mohr (Paul Siebeck), Tübingen, 1996, at p. 43.

⁵⁶ See DE CRUZ, P., *Comparative Law in a Changing World*, Third Edition, Routledge-Cavendish, London, 2007, p. 244-245.

⁵⁷ See GERBER, D.J., “Comparative Antitrust Law” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 1193-1224, at p. 1195.

systems.⁵⁸ For instance, in the EU, since the late 1990s more U.S. law elements have been introduced into EU competition law.⁵⁹ However, this does not mean that the U.S. law and experience should be accepted uncritically, but it should be more carefully examined, and should be related analytically to the conditions found in other countries.⁶⁰

The value of comparative competition law is also increasing as it contributes to an understanding of how different enforcement issues are dealt with⁶¹ and, arguably, can therefore be useful in determining the optimal way for regulating the enforcement of antitrust rules. In doing so, particular importance should be given to legal decisions in relation to the factors, such as texts, interests, institutions, communities, and patterns of thought, which influence them.⁶²

In this thesis, all the examined jurisdictions belong either to the Civil Law or Common Law system, which makes them particularly apt to be compared since – despite their differences in historical development, organization, etc. – they all follow Western traditions, and often provide for relatively similar solutions to the same legal problems. However, even within a legal family, there are naturally differences between legal systems and, therefore, for example an analysis of private enforcement in both the United Kingdom and the United States is called for in light of their rather different procedure law. It is also important to bear in mind that apart from the U.S. and Canadian legal systems, all the other jurisdictions studied form part of the EU legal system, thus making a legal comparison particularly appropriate since all the substantive competition rules are the same in these jurisdictions, and the obligation to comply with the principles of equivalence and effectiveness serves as a limit on the application of national procedural rules.

⁵⁸ *Ibid.*, at p. 1205-1206.

⁵⁹ For example, the U.S. immunity program served as a model for the introduction of a leniency program into the EU. See GERBER, D.J., “*Comparative Antitrust Law*” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2008, p. 1193-1224, at p. 1211.

⁶⁰ *Ibid.*, at p. 1223.

⁶¹ *Ibid.*, at p. 1218.

⁶² *Ibid.*, at p. 1222.

1.3.3. Presentation of Sources

The primary sources used in the thesis will include legislation in force as well as legislative proposals and case law regarding antitrust enforcement in the EU (notably in the United Kingdom, Germany, France, Spain, Sweden and Finland) and in the United States and Canada. As to Union sources, in addition to EU case law, the emphasis will be on the official documents of the Commission, in particular, the Directive on the Antitrust Damages Actions,⁶³ the Proposal for a Directive on certain rules governing antitrust damages actions,⁶⁴ the Recommendation on Collective Redress Mechanisms,⁶⁵ the failed Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty, the Green Paper⁶⁶ and White Paper on Damages action for breach of the EC antitrust rules⁶⁷ as well as the Commission Staff Working Document ‘Towards a Coherent European Approach to Collective Redress’.⁶⁸ With regard to the United States, the main primary sources will be federal statutes and case law, although reference will sometimes be made to state case law, when significant differences between federal and state law justify this. Similarly, with regard to Canada, the main sources consist of federal statutes and case law, while statutes and case law of the Canadian provinces will only be taken into account when that is of particular relevance for the research topic.

⁶³ Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, *see* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

⁶⁴ Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013.

⁶⁵ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

⁶⁶ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005 and Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005.

⁶⁷ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, and Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008.

⁶⁸ Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, 4.2.2011.

Secondary sources employed will encompass books and articles on legal doctrine both in the EU – at the Union as well as at the national level – and the United States and Canada. The articles are mainly published in legal reviews specialized in competition law or commercial law but, for instance, some legal reviews with the focus on EU law or international law are also included. In addition, the bibliography will contain several studies commissioned by the Commission on private enforcement of the antitrust rules and on collective actions.

The main part of the sources used will be European since the aim of the thesis is to propose a solution to remedy the under-enforcement of the EU antitrust rules. Similarly, predominantly sources from this century will be used because private enforcement did not receive much attention in the EU before, and important reforms of the antitrust enforcement models have recently been implemented at the national level in several Member States.⁶⁹

1.4. Definitions

This section defines key legal concepts that will be used in the thesis.

Antitrust violation

An antitrust violation refers to an infringement of the antitrust rules. In the EU context, this means an infringement of Article 101 or 102 TFEU, i.e. the violation could consist in a cartel, a horizontal or vertical anti-competitive agreement or practice, or an abuse of a dominant position. The corresponding U.S. antitrust rules are Sections 1 and 2 of the Sherman Act, while the Canadian equivalents are Sections 45, 78 and 79 of the Canadian Competition Act.⁷⁰ In addition, all Member States of the European Union have their own national antitrust rules.

Collective action

⁶⁹ See Section 2.2 for some examples.

⁷⁰ Competition Act, R.S.C., 1985, c. C-34. In addition, Section 47 criminalizes bid-rigging, and Section 77 prohibits under certain conditions restrictive practices, such as exclusive dealing, tied-selling and market restriction.

A great variety of forms of group litigation exist and, hence, it is difficult to classify different categories of group litigation in a satisfactory way.⁷¹ In this thesis the term “collective actions” is used as an umbrella term to encompass different types of actions brought by several claimants together, or by one claimant or a representative entity on behalf of several claimants. It thus includes class actions, representative actions, and collective claims in which the claims of several victims are brought under one single collective claim. However, this thesis will not examine the so-called joint actions in which a set of claims are brought by several claimants together against the same defendant, or are joined by the judge hearing the claims due to a legal link between them, because these actions are not appropriate to improve access to compensation, as they are only available when individuals have already taken actions against the infringers. Moreover, if the claimants are numerous, this will result in complex mass litigation in which all claims must be treated separately, and awards must be made individually, although a single judgment may be made with regard to the cases of all the claimants.⁷²

The term “class action” serves to define the U.S.-style class action, i.e. under which one party or a group of parties may bring an action as representatives of a larger class of unidentifiable individuals. Any member of the class that does not opt out will be bound by the judgment, and any award resulting from the action will be made to the members of the class as a whole. “Representative action” is used to define an action brought by a representative organization, such as a consumer association, on behalf of its members, and any awards are, in general, made to individual members.⁷³ Finally, “collective action”, or alternatively “group action”, refers to a single claim, which is brought on behalf of a group of identified/identifiable individuals (except when “collective action” is used as an umbrella term in this thesis). Any damages resulting from the action will be awarded to the group as a whole.⁷⁴

⁷¹ See External Impact Study, at p. 268.

⁷² See STADLER, A., “Collective Action as an Efficient Means for the Enforcement of European Competition Law” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 195-213, at p. 202.

⁷³ See WAELEBROECK, D., SLATER, D. and EVEN-SHOSHAN, G., “Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules”, August 31st, 2004, at p. 43.

⁷⁴ These definitions are mainly based on the definitions made in the Ashurst Study (see WAELEBROECK, D., SLATER, D. and EVEN-SHOSHAN, G., “Ashurst Study on the conditions of claims for damages in

Corporate statements

By corporate statements the Commission refers to “*all those voluntary presentations, by or on behalf of an undertaking to the competition authority, of the undertaking’s knowledge of a cartel and its role therein, which are drawn up specifically for submission under the Leniency Notice*”.⁷⁵

Cy pres

A *cy pres* distribution means that the damages are not distributed directly to those injured by an antitrust violation in order to compensate for the harm that they suffered, but are instead used to achieve a result which is as close as possible to the compensation of the harm.⁷⁶ Typically a *cy pres* distribution of damages is used in US-style class actions when it is very difficult or impossible to identify all the victims, or when the distribution of the damages would be too costly because of the limited damages award.

Discovery

Discovery refers to the obligation of parties to court proceedings to disclose information that the disclosing party may use to support its case. In the United States, the Federal Rules of Civil Procedure contain very liberal discovery rules. Information to be disclosed could relate to the identities of individuals likely to have discoverable information, copies or descriptions of relevant documents in the control of the party, and a calculation of damages claimed. This information must be disclosed without waiting for a discovery request.⁷⁷ Parties may obtain discovery regarding any matter, provided that it is not privileged, that is relevant to the claim or defense of any party, even if the relevant material is not admissible at the trial, “*if discovery appears reasonably calculated to lead to the discovery of admissible evidence*.”⁷⁸ On the

case of infringement of EC competition rules”, August 31st, 2004, at p. 43), but the content of each action varies between the Member States.

⁷⁵ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 86.

⁷⁶ *Ibid.*, at p. 18.

⁷⁷ Fed. R. Civ. P. 26(a)(1).

⁷⁸ Fed. R. Civ. P. 26(b)(1).

contrary, this is usually not possible in most EU Member States where only identified, specific documents being admissible as evidence may be requested.⁷⁹

Follow-on action

The term “follow-on action” is used to describe an action for damages that is brought on the back of a decision adopted by public (competition) authorities.⁸⁰

Leniency

Under EU law, leniency refers to rewarding undertakings which are or have been party to secret cartels affecting the European Union and which have cooperated in the Commission investigation in order to uncover the cartel and bring it to an end. Under the leniency program,⁸¹ the Commission will grant immunity from any fine which would otherwise have been imposed on an undertaking disclosing its participation in an alleged cartel if the undertaking is the first to submit information and evidence which will enable the Commission to carry out a targeted inspection in connection with the alleged cartel or find an infringement of Article 101 TFEU in connection with the alleged cartel.⁸² Other undertakings disclosing their participation in an alleged cartel affecting the Union may be eligible to benefit from a reduction of any fine that would otherwise have been imposed, if they provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession.⁸³

Opt-in collective action

An opt-in collective action refers to a collective action brought by a claimant on behalf of group members who have been identified in advance and have taken active steps to join the action. The claims of the claimant and the group members are merged into one

⁷⁹ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, 3rd edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 106.

⁸⁰ See Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 6-7.

⁸¹ See Commission Notice on immunity from fines and reduction of fines in cartel cases, *OJ C* 298, 8.12.2006, p. 17-22.

⁸² *Ibid.*, at § 8.

⁸³ *Ibid.*, at § 23-24.

single action. The judgment will only bind those individuals who have expressly decided to join (“opt in”) the collective action.⁸⁴

Opt-out collective action

Contrary to the opt-in collective action, an opt-out collective action can also be brought on behalf of unidentified persons, and the judgment given in the case will bind all group members except the members, who have opted out from the action within a period established by a court.⁸⁵

Passing-on defense

The passing-on defense means that the defendant in an antitrust damages case is allowed to invoke that the claimant has passed on to his customers all or part of the illegal overcharge (i.e. the part of the price paid that is in excess of the competitive price) that he has paid to the defendant. If the passing-on defense is allowed, the defendant can limit his liability for compensation.⁸⁶

Private enforcement

Private enforcement of antitrust rules refers to the application of antitrust rules by courts when they declare anti-competitive agreements null,⁸⁷ grant injunctions in order to put an end to anti-competitive behavior or award damages to the victims of antitrust

⁸⁴ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 20.

⁸⁵ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21 and LESKINEN, C., “Antitrust Damages Actions: The Case for Opt-out Collective Actions in Cases Involving Numerous Individual Claims of Low Value” in VELASCO SAN PEDRO L.A, ALONSO LEDESMA C., ECHEBARRÍA SÁENZ J.A., HERRERO SUÁREZ C., and GUTIÉRREZ GILSANZ J. (eds.), *Private Enforcement of Competition Law*, Lex Nova, Valladolid, 2011, at p. 289.

⁸⁶ See Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 63.

⁸⁷ The nullity of agreements which breach Article 101(1) TFEU and do not meet the conditions in order to justify an exemption under Article 101(3) TFEU can be relied on by anybody, i.e. both parties to the agreements and third parties. See Judgment in *Courage*, C-453/99, EU:C:2001:465, paragraph 22. It is e.g. possible to invoke the antitrust rules as a defense, especially against actions for the enforcement of a contract, or against actions for the enforcement of other rights, for example, intellectual property rights if the enforcement of such rights constitutes an abuse of a dominant position. See Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 7, Note 5.

violations.⁸⁸ However, for the purpose of this thesis, the term “private enforcement” will only be used to refer to antitrust damages actions, unless otherwise noted.

Public Enforcement is used to describe enforcement actions taken by competition authorities. Generally, the aim is to punish infringers for the antitrust violations which they have committed, and to deter future infringements. The most commonly used sanctions are fines imposed on companies – and in some jurisdictions also on individuals – but some countries also provide for criminal sanctions and/or disciplinary sanctions.⁸⁹

Stand-alone action

A stand-alone action refers to an action for damages that is brought when there is no prior decision from a competition authority finding an antitrust violation.⁹⁰

⁸⁸ The intervention by the European Commission or national competition authorities as *amicus curie* in civil proceedings between private parties could also be characterized as private enforcement. See EHLERMANN, C-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001. Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oregon, 2003, p. i-xlii, at p. xxiv.

⁸⁹ See e.g. section 188 of the UK Enterprise Act 2002 and section 8(1)(b)(ii) of the Irish Competition Act 2002.

⁹⁰ See Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 18.

2. BACKGROUND OF THE RESEARCH PROJECT AND THE STATE OF THE ART IN THE FIELD

2.1. At Union Level

In the EU, the policy choice for the enforcement of the EU antitrust rules has been public enforcement. The focus has hence been on the enforcement by the competition authorities, i.e. by the Commission, which imposes fines on undertakings that have committed an antitrust violation. Before May 2004, national competition authorities and national courts used to only play a minor role in the enforcement of Articles 101 and 102 TFEU⁹¹ [ex Articles 81 and 82 EC]⁹² since only the Commission could grant an individual exemption to undertakings whose agreements or concerted practices were caught by the prohibition in Article 101(1) TFEU, but which met the conditions laid down by Article 101(3)].⁹³ In order to obtain legal certainty about the compatibility of their agreements with the EU antitrust rules, companies therefore notified their agreements to the Commission and sought either an exemption or a so-called negative clearance, i.e. either a formal decision or, in practice, an informal comfort letter in which the Commission stated that there were no grounds under Article 101(1) TFEU or Article 102 TFEU to take action in respect of the agreement or practice notified to it.⁹⁴

Similarly, when an antitrust violation occurred, the victims would rather file a complaint with the Commission than lodge a complaint before the national competition authorities or bring an action before the national courts,⁹⁵ because neither the national

⁹¹ See JONES, A. and SUFRIN, B., *EU competition law. Text, cases and materials*, 4th edition, Oxford University Press Inc., New York, 2011, at p. 1152.

⁹² Given that the Treaty numbering has been changed twice since the adoption of the Treaty of Rome, in referring to the main antitrust rules the Treaty numbering currently in force will be used throughout the thesis for the sake of simplification.

⁹³ See Article 9(1) of EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21/02/1962, p. 204-211. However, it is recalled that the national courts could apply block exemptions to the agreements the legality of which they were requested to decide on. See Commission Notice on the co-operation between national courts and the Commission in applying Articles 85 and 86 EEC, OJ C 39, 13.2.1993, p. 6-12, at § 8.

⁹⁴ See EUROPEAN COMMISSION, “*Glossary of terms used in EU competition policy. Antitrust and control of concentrations*”. Nevertheless, the undertakings did obviously not notify hard-core violations of Article 101(1) TFEU to the Commission, so the notification system did not serve to detect the most serious antitrust violations. See WILS, W.P.J., *Principles of European Antitrust Enforcement*, Hart Publishing, Oxford and Portland, Oregon, 2005, at p. 10-11.

⁹⁵ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 25-26.

competition authorities nor the national courts had competence to assess whether the agreement or concerted practice fulfilled the criteria required for granting an individual exemption under EU law and, therefore, could not decide whether an agreement infringing Article 101(1) TFEU was compatible with the EU antitrust rules, unless the agreement was covered by a block exemption regulation.

Nevertheless, national courts had the competence to enforce Article 101(2) TFEU⁹⁶ and thus to declare anti-competitive agreements or concerted practices null if the Commission had refused to grant an exemption under Article 101(3) TFEU, since the competition authorities cannot decide on the civil consequences of anti-competitive agreements, but that task is entrusted to the courts.⁹⁷ Similarly, national courts could declare an agreement null if the undertakings had failed to notify it to the Commission. Furthermore, if it was clear that the agreement could never fulfill the criteria laid down in Article 101(3) TFEU, they could declare the agreement null.⁹⁸ In other situations in which a court was asked to decide on an alleged antitrust violation, the court was forced to suspend the proceedings until the Commission had decided on whether or not to exempt the agreement in question.

National courts were normally faced with claims alleging antitrust violations in the context of disputes regarding contractual obligations. The claimant would either allege that his co-contractor had breached his contractual obligations or would demand that the co-contractor fulfill his contractual obligations. The co-contractor would then counter-argue that he could not be obliged to fulfill these obligations since the agreement in question was violating Article 101 TFEU and had to be considered null.⁹⁹ Thus, the EU antitrust rules were typically used by individuals as a “shield” in order to defend themselves against claims, usually based on a contract, but also by third parties invoking Article 102 TFEU as a defense, for example, to an intellectual property

⁹⁶ See Judgment in *BRT v SABAM*, C-127/73, EU:C:1974:25, paragraph 16.

⁹⁷ See Commission Notice on the co-operation between national courts and the Commission in applying Articles 85 and 86 EEC, OJ C 39, 13.2.1993, p. 6-12, at § 6.

⁹⁸ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 30-31.

⁹⁹ See KOMNINOS, A.P., “Introduction” in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001 Effective Private Enforcement of EC Antitrust Law*, Oxford – Portland, Oregon, 2003, p. xxi-xlii, at p. xxvii.

infringement action brought by a dominant undertaking. On the contrary, the use of the EU antitrust rules as a so-called “sword” by lodging a claim before a national court requesting damages, restitution, injunctive relief, or interim measures was quite unusual.¹⁰⁰

The Commission’s monopoly to grant exemptions under Article 101(3) TFEU required a significant part of the resources assigned to the Directorate-General for Competition (hereinafter “DG COMP”).¹⁰¹ In addition, DG COMP tended to exempt most of the notified agreements¹⁰² or to close the case by a comfort letter, i.e. an informal administrative letter either stating that there were no grounds under Article 101(1) or 102 TFEU to take action in respect of the agreement or conduct notified to it (a so-called negative clearance), or stating that the agreement fulfilled the conditions for granting an exemption under Article 101(3) TFEU.¹⁰³ Moreover, as national courts could not apply Article 101(3) TFEU, in practice, undertakings could bring court proceedings regarding an antitrust violation to a halt by lodging a notification with the Commission, thus causing a major obstacle to a more extensive application of the antitrust rules by national courts.¹⁰⁴ In view of the enlargement of the European Union to central and eastern Europe that was about to take place, and would increase the EU Member States by ten new members, the notification practice was therefore no longer considered as an efficient way of enforcing the EU antitrust rules.¹⁰⁵

Consequently, in order not to diminish the enforcement of EU competition law, the EU decided to modernize the enforcement model of Articles 101 and 102 TFEU by

¹⁰⁰ See JACOBS, F.G., “*Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective*” in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001 Effective Private Enforcement of EC Antitrust Law*, Oxford – Portland, Oregon, 2003, p. 187-232, at p. 189-190.

¹⁰¹ See WILS, W.P.J., *Principles of European Antitrust Enforcement*, Hart Publishing, Oxford and Portland, Oregon, 2005, at p. 11.

¹⁰² See White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty – Corrigendum, COM (99) 101 final, *OJ C* 132, 12.5.1999, p. 1-33, at § 77.

¹⁰³ See EUROPEAN COMMISSION, “*Glossary of terms used in EU competition policy. Antitrust and control of concentrations*”.

¹⁰⁴ See White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty – Corrigendum, COM (99) 101 final, *OJ C* 132, 12.5.1999, p. 1-33, at § 100.

¹⁰⁵ See BASEDOW, J., “The modernization of European competition law: a story of unfinished concepts”, *Tex. Int’l L.J.*, Volume 42, Number 3, p. 429-439, at p. 429.

adopting Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (hereinafter “Regulation 1/2003”).¹⁰⁶ The new enforcement framework, which entered into force on May 1st, 2004, decentralized the enforcement of EU antitrust rules in that it abolished the Commission’s monopoly to grant exemptions and established a directly applicable exception system. Hence, all agreements, decisions and concerted practices caught by Article 101(1) TFEU which satisfy the conditions of Article 101(3) TFEU shall not be prohibited and a prior decision to that effect is not required.¹⁰⁷ Similarly, all agreements and concerted practices that infringe Article 101(1) TFEU and are not covered by a block exemption or do not fulfill the criteria of Article 101(3) TFEU are automatically void under Article 101(2) TFEU. As a consequence, companies themselves are to assess whether their agreements comply with the EU antitrust rules. The new model has thus abolished the *ex ante* notification system, and is instead based on an *ex post* control of agreements. As a result, the Commission now has more resources to deal with the most serious forms of antitrust violations, such as cartels.

The new antitrust enforcement framework establishes a decentralized enforcement model where the Commission and the national competition authorities (hereinafter “the NCAs”) form a network, the “European Competition Network” (hereinafter “the ECN”), for cooperation in the application and enforcement of EU competition policy.¹⁰⁸ It is built on a system of parallel competences in which all competition authorities have the power to apply Articles 101 or 102 TFEU,¹⁰⁹ and its aim is to ensure an efficient division of work, and an effective and consistent application of EU antitrust rules.¹¹⁰ In order to achieve this uniform application of the EU antitrust rules throughout the

¹⁰⁶ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L* 1, 4.1.2003, p. 1-25. Regulation 1/2003 replaced Regulation 17, which had governed the enforcement of the EC antitrust rules for approximately 40 years and had created a centralized notification system. See EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, *OJ* 13, 21.2.1962, p. 204-211. For more details on the institutional framework established by Regulation 1/2003, see Chapter 1 of ORTIZ BLANCO, L., *EU Competition Procedure*, Third Edition, Oxford University Press, 2013.

¹⁰⁷ Article 1(2) of Regulation 1/2003.

¹⁰⁸ See Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.4.2004, p. 43-53, at § 1.

¹⁰⁹ For more details on the application of Articles 101 and 102 TFEU by the NCAs, see Chapter 3 of ORTIZ BLANCO, L., *EU Competition Procedure*, Third Edition, Oxford University Press, 2013.

¹¹⁰ *Ibid.*, at § 3 and 5.

European Union, Regulation 1/2003 provides for certain safeguards. As a consequence, when a NCA applies Articles 101 and 102 TFEU, it shall inform the Commission in writing before or without delay after commencing the first formal investigative measure.¹¹¹ Similarly, it shall inform the Commission at least 30 days before it adopts a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation.¹¹² If the Commission initiates proceedings in a case, the NCAs will be relieved of their competence to apply Articles 101 and 102 TFEU. The Commission may also take over a case that is being dealt with by a NCA, but only after consulting with that NCA.¹¹³ In addition, when the NCAs rule on agreements, decisions or practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.¹¹⁴

In the new decentralized competition enforcement model, national courts may also enforce Articles 101 and 102 TFEU.¹¹⁵ As the NCAs, they cannot take decisions running counter to a decision already adopted by the Commission. Moreover, they must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings which it has initiated and, if they deem it necessary for the fulfillment of that obligation, the national courts may stay the proceedings in question.¹¹⁶

¹¹¹ Article 11(3) of Regulation 1/2003.

¹¹² Article 11(4) of Regulation 1/2003.

¹¹³ Article 11(6) of Regulation 1/2003.

¹¹⁴ Article 16(2) of Regulation 1/2003.

¹¹⁵ For more details on the role played by national courts, see Chapter 2 of ORTIZ BLANCO, L., *EU Competition Procedure*, Third Edition, Oxford University Press, 2013.

¹¹⁶ Article 16(1) of Regulation 1/2003. It should, nevertheless, be borne in mind that the fact that national courts cannot take decisions contrary to Commission Decisions does not mean that public enforcement would somehow prevail over private enforcement by civil courts, but only that the Commission, in its capacity as a supranational Union organ, has primacy over national courts. See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 16. Similarly, if the Commission decides not to proceed to find an infringement of the EU antitrust rules, but accepts commitments, the national civil courts are not bound by those commitments with regard to the applicability or non-applicability of Articles 101 and 102 TFEU, and may decide whether or not those rules have been breached. However, they cannot undermine the effectiveness of the Commission Decision and, consequently, the judgment could only have *inter partes res judicata* effect, whereas the Commission's commitments decision would be binding *erga omnes*. National civil courts are also not bound by settlements or leniency programs, but remain free to award damages if they find that the EU antitrust rules have been infringed. *Ibid*, at p. 19-20.

According to the Commission, the aim of the reform of the enforcement of the EU antitrust rules was also to promote private enforcement through national courts, and to bring the role national courts play in the enforcement of the antitrust rules in line with the important role that they play in the enforcement of EU law in general,¹¹⁷ since both Article 101(1) TFEU and Article 101(3) TFEU confer rights on individuals, which should be protected by national courts.¹¹⁸ In the new enforcement model, national courts thus play a three-fold role by deciding contractual liability proceedings,¹¹⁹ non-contractual liability proceedings, and granting injunctions. Undertakings, in turn, are able to invoke the direct applicability of Article 101(3) TFEU as an argument in their defense before the courts, which allows them to obtain immediate civil enforcement of those of their restrictive practices which satisfy the conditions of Article 101(3) TFEU. Similarly, victims of illegal agreements should be able to obtain damages more quickly.¹²⁰

As Regulation 1/2003 confers national competition authorities and courts the competence to apply Articles 101 and 102 TFEU in full, the modernization of the EU antitrust rules has, at least in theory, paved the way for increased private enforcement given that national courts are now allowed to also apply Article 101(3) TFEU directly. In other words, they can examine whether an alleged anti-competitive agreement or practice fulfills the conditions of Article 101(3) TFEU, and there is no longer a need to stay the national proceeding until the Commission has decided on whether these conditions are met or not.¹²¹ If the agreement fulfills the criteria laid down in Article

¹¹⁷ For examples of the importance of the national courts in the enforcement of Union rights, *see* Judgment in *van Gend & Loos*, C-26/62, EU:C:1963:1 and Judgment in *BRT v SABAM*, EU:C:1974:25, paragraphs 15-17.

¹¹⁸ Recital 2C 1(a) of the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty"), COM (2000) 582 final, *OJ C* 365E, 19.12.2000, p. 284–296.

¹¹⁹ Contractual liability proceedings refer to disputes between parties to an agreement, whereas non-contractual liability proceedings refer to disputes between a third party and one or more parties to the agreement, *see* White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty – Corrigendum, COM (99) 101 final, *OJ C* 132, 12.5.1999, p. 1-33, at § 100.

¹²⁰ *Ibid.*, at § 99-100.

¹²¹ However, it should be noted that although the notifications have been abolished, national courts may in certain situations still have an obligation to suspend their proceeding and await the Commission Decision on a complaint or an *ex officio* investigation regarding the same alleged antitrust violation. For more details, *see* Section XXX.

101(3) TFEU, the agreement or concerted practice is consequently exempt from the application of the prohibition laid down by Article 101(1) TFEU. Conversely, if the agreement or concerted practice infringes Article 101(1) TFEU and fails to fulfill all the cumulative criteria of Article 101(3) TFEU, the court in question must find the existence of an antitrust violation. Moreover, the court must declare the anti-competitive agreement or concerted practice null.¹²²

However, the Treaty on the Functioning of the European Union does not contain any explicit provision on liability in damages for infringements of Article 101 and 102 TFEU.¹²³ Instead, this right has been deduced from Article 4(3) TEU [ex Article 10 EC] and the principle of effectiveness,¹²⁴ and later explicitly recognized by the European Court of Justice (hereinafter “the ECJ”) in *Courage*.¹²⁵

First, the ECJ held in *BRT v SABAM* that Articles 101 and 102 TFEU produce direct effects in relations between individuals and “*create direct rights in respect of the individuals concerned which the national courts must safeguard*”.¹²⁶ This means that individuals may bring an action before the national courts against an undertaking which has infringed Article 101 or 102 TFEU, or they may defend themselves against a claim by invoking a breach of these articles.¹²⁷

Second, Article 4(3) TEU provides that Member States shall take all appropriate measures to ensure fulfillment of the obligations arising out of the Treaties or resulting from action taken by the institutions of the Union. Moreover, they shall facilitate the

¹²² Article 101(2) TFEU.

¹²³ But in spite of this the Commission has always considered that undertakings bear the risk of being held liable to pay damages and interest for antitrust violations to third parties. See JONES, C. A., *Private Enforcement of Antitrust in the EU, UK and the US*, Oxford University Press, New York, 1999, at p. 33-34.

¹²⁴ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 9.

¹²⁵ Judgment in *Courage*, EU:C:2001:465, paragraph 26.

¹²⁶ Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 16. According to the doctrine of direct effect, articles of the TFEU produce direct effects if they are intended to confer rights on individuals, and are sufficiently clear and unconditional. If these conditions are fulfilled, individuals can rely on the Treaty Article in question before national courts to enforce the rights it confers on them. See CRAIG, P. and DE BÚRCA, G., *EU Law. Text, Cases and Materials*, 5th edition, Oxford University Press, Oxford New York, 2011, at p. 186.

¹²⁷ See JONES, A. and SUFRIN, B., *EU competition law. Text, cases and materials*, 4th edition, Oxford University Press Inc., New York, 2011, at p. 1185.

achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. Given that the ECJ has held that Articles 101 and 102 TFEU have direct effect, Member States are obliged to ensure the enforcement of those articles and to refrain from measures that could jeopardize the enforcement of the EU antitrust rules.

Third, the ECJ has held in numerous judgments starting with *Van Gend & Loos*¹²⁸ that the full effectiveness of EU law requires that not only the Commission and the Member States, but also individuals ensure the fulfillment of the obligations imposed by the Treaty.¹²⁹ Accordingly, individuals should also be entitled to participate in the vigilance of the compliance with Union obligations.

The meaning of “effectiveness” can be two-fold: first, it could refer to “effective enforcement” in the sense of effective compliance by the Member States with their obligations under EU law. Thus, the judicial protection of the individuals concerned would only be an instrument to ensure the effective compliance of Member States with their obligations and would not be an aim as such. Second, effectiveness could refer to “effective judicial protection”, i.e. individuals would have to be able to obtain redress when their rights are infringed by a breach of EU law.¹³⁰

The case law on state liability provides further guidance on this issue and, in fact, served as a basis for the ECJ when it confirmed that a civil liability in damages of individuals exists for antitrust violations. In *Francovich*, the ECJ derived the existence of state liability from the necessity to protect the rights granted by Community [now Union] rules by enabling individuals “*to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible*”.¹³¹ The Court added that the obligation of Member States to make good such a loss and

¹²⁸ Judgment in *van Gend & Loos*, EU:C:1963:1.

¹²⁹ See, for example, Judgment in *Kraaijeveld and Others*, C-72/95, EU:C:1996:404, paragraph 56, Judgment in *Muñoz and Superior Fruiticola*, C-253/00, EU:C:2002:497, paragraphs 30-31, and NEBBIA, P., “Damages actions for the infringement of EC competition law: compensation or deterrence?”, *E.L. Rev.*, Vol. 33, No. 1, February 2008, p. 23-43, at p. 28-29.

¹³⁰ See NEBBIA, P., “Damages actions for the infringement of EC competition law: compensation or deterrence?”, *E.L. Rev.*, Vol. 33, No. 1, February 2008, p. 23-43, at p. 28-30.

¹³¹ Judgment in *Francovich and Bonifaci*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 33.

damage derives from Article 10 EC [now Article 4(3) TEU], and it includes the obligation to nullify consequences of a breach of Community [now Union] law.¹³²

In *Brasserie du Pêcheur*, the ECJ clarified that in the event of an infringement of a right directly conferred by a Community [now Union] provision upon which individuals are entitled to rely before national courts, “*the right to reparation is a necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained*”.¹³³ However, it did not explicitly state that liability in damages would help ensuring compliance by the Member States with their obligations under EU law, but emphasized the judicial protection rationale of state liability.¹³⁴

What is more, in *Konle*, the Court stressed the effective judicial protection by holding that Member States are to ensure that individuals obtain reparation for loss and damage caused to them by non-compliance with EU law regardless of which public authority is responsible for the breach or, under national law, responsible for making reparation.¹³⁵ In other words, what matters is that the individual is compensated for his loss regardless of whether the breach of EU law has *de facto* been caused by the Member State,¹³⁶ and the Member State is held responsible for the breach even if the public authority responsible for it did not have the necessary powers, knowledge, means or resources.¹³⁷ Consequently, the full effectiveness of directly applicable EU law requires that national courts may award damages¹³⁸ in the event of a breach of that law. As a consequence, in order to guarantee the full effectiveness of the directly applicable EU antitrust rules, victims of an antitrust violation should also be entitled to claim damages.¹³⁹

¹³² Judgment in *Francovich and Bonifaci*, EU:C:1991:428, paragraph 36.

¹³³ Judgment in *Brasserie du Pêcheur v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 22.

¹³⁴ See NEBBIA, P., “Damages actions for the infringement of EC competition law: compensation or deterrence?”, *E.L. Rev.*, Vol. 33, No. 1, February 2008, p. 23-43, at p. 32.

¹³⁵ Judgment in *Konle*, C-302/97, EU:C:1999:271, paragraph 62.

¹³⁶ See NEBBIA, P., “Damages actions for the infringement of EC competition law: compensation or deterrence?”, *E.L. Rev.*, Vol. 33, No. 1, February 2008, p. 23-43, at p. 34.

¹³⁷ Judgment in *Haim*, C-424/97, EU:C:2000:357, paragraph 28.

¹³⁸ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 9.

¹³⁹ Similarly, the full effectiveness of directly applicable EU law, including Articles 101 and 102 TFEU, also requires that national courts may grant injunctive relief when they can establish a breach of the directly applicable provision in question.

In its case law on state liability the ECJ has thus confirmed that an EU right to damages exists for breach of EU law regardless of whether national law recognizes a damages remedy for those breaches. In other words, the right to damages is an EU law remedy, which national courts must enforce. In the context of antitrust damages actions, Member States' procedural autonomy is therefore limited given that the right to compensation is founded directly on EU law, and Member States are obliged to enforce that right. If a Member State refused to do so, it could itself be required to pay damages for having breached its obligations under Article 4(3) TEU by not providing full protection of Union rights.¹⁴⁰

In his opinion in *Banks*, AG van Gerven stated that the right to damages would also be applicable in horizontal situations, i.e. where an action for damages is brought by an individual or undertaking against another individual or undertaking for breach of a directly effective EU provision, in the case at issue Articles 101(1) and 102 TFEU. According to AG van Gerven, the full effect of EU law requires that an individual who has suffered damage as a result of a breach of a right granted under EU law has the possibility of seeking compensation from the party responsible for that breach.¹⁴¹

In 1997, in *Guérin automobiles v Commission*, the ECJ found that any *undertaking* [italics supplied] that has suffered damage as a result of a restrictive practice may rely before the national courts on the rights conferred by Articles 101(1) and 102 TFEU, particularly if the Commission has decided not to act on a complaint, because these articles produce direct effect in relations between individuals.¹⁴² Consequently, the ECJ recognized that undertakings may rely on these Treaty articles to claim damages for loss caused by antitrust violations. But it was not until *Courage* that the Court held that *any individual* [italics supplied] could rely on a breach of Article 101(1) TFEU before the national courts, and that this right extended even to a party to a contract that was liable

¹⁴⁰ See JONES, C. A., *Private Enforcement of Antitrust in the EU, UK and the US*, Oxford University Press, New York, 1999, at p. 72-73.

¹⁴¹ Opinion of AG van Gerven in *Banks v British Coal*, C-128/92, EU:C:1993:860. However, the ECJ did not rule on this issue as it reached the conclusion that the relevant Treaty applicable to the case was the ECSC Treaty and not the EEC Treaty. Judgment in *Banks v British Coal*, C-128/92, EU:C:1994:130, at § 8-10.

¹⁴² Judgment in *Guérin automobiles v Commission*, C-282/95 P, EU:C:1997:159, paragraph 39.

to restrict or distort competition.¹⁴³ Moreover, the right to seek damages is independent of whether or not the Commission is acting on a possible complaint as the ECJ did no longer refer to that particular situation. The Court found that a right to damages for antitrust violations is necessary in order to ensure the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in that provision¹⁴⁴ since it discourages anti-competitive agreements and practices, which are often secret.¹⁴⁵

In *Courage*, the ECJ thus expressly extended the principles giving rise to a remedy against Member States for breaches of EU law to liability for breaches of the EU antitrust rules by individuals in that it recognized an EU right to claim damages for antitrust violations, arguing that this right is necessary in order to ensure the full effectiveness of the antitrust rules. In other words, the judgment created individual liability for breaches of Articles 101 and, arguably, 102 TFEU. Moreover, national courts are obliged to give effect to the EU right to damages regardless of national provisions.¹⁴⁶

Although *Courage* only refers to Article 101 TFEU, any individual that has suffered harm as a result of a breach of Article 102 TFEU should also be entitled to bring an action for damages, since the full effectiveness of Article 102 TFEU would also be put at risk, if any individual could not claim damages for loss caused to him by abusive conduct.¹⁴⁷ Similarly, even though the ECJ only expressly stated that even contracting

¹⁴³ Judgment in *Courage*, EU:C:2001:465, paragraph 24.

¹⁴⁴ Judgment in *Courage*, EU:C:2001:465, paragraph 26.

¹⁴⁵ Judgment in *Courage*, EU:C:2001:465, paragraph 27.

¹⁴⁶ See JONES, C. A., *Private Enforcement of Antitrust in the EU, UK and the US*, Oxford University Press, New York, 1999, at p. 74.

¹⁴⁷ See LESKINEN, C., “The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 38-39. Although infringements of Article 102 TFEU differ from infringements of Article 101 TFEU in that some of the latter infringements are committed through the conclusion of secret agreements which already because of their nature are very difficult to detect, putting an end to an abuse of a dominant position would, however, also benefit the economy since the abuse could otherwise, for example, lead to the foreclosure of the market, ineffective allocation of resources, and higher prices. Consequently, if an individual (be it a consumer, customer or competitor) were to bring an action for damages for a breach of Article 102 TFEU in a case where the Commission or the NCAs have not taken action, it would contribute to the deterrent effect of the EU antitrust rules. Moreover, the ECJ has held that Article 102 TFEU has direct effect, and that any undertaking that has suffered damage as a result of restrictive practices may

parties could rely on Article 101 TFEU, third parties must also be entitled to bring antitrust damages actions.¹⁴⁸ This has been confirmed in *Manfredi* in which an Italian court asked in a preliminary reference whether third parties could claim damages for the harm suffered as a result of an agreement or concerted practice prohibited by Article 101 TFEU.¹⁴⁹ The ECJ held that “any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under [Article 101 TFEU]”.¹⁵⁰ Provided that the claimant can establish a causal relationship between the anti-competitive agreement or practice and the harm that he has suffered as a consequence of it, he would thus be entitled to bring an antitrust damages action.¹⁵¹

However, as there are no Union procedural rules governing antitrust damages actions, but the detailed procedural rules are laid down by Member States,¹⁵² the ECJ reiterated in *Courage* its earlier case law,¹⁵³ pursuant to which EU law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.¹⁵⁴ EU law does also not prevent national courts from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party, provided that the principles of equivalence and effectiveness are

rely before the national courts on rights conferred by Article 102 TFEU. There is no reason to assume that, for instance, consumers harmed by an infringement of Article 101 TFEU would be entitled to claim damages whereas they would be denied that right in case of a breach of Article 102 TFEU. See Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 16 and Judgment in *Guérin automobiles v Commission*, EU:C:1997:159, paragraph 39.

¹⁴⁸ See LESKINEN, C., “The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 39.

¹⁴⁹ Judgment in *Manfredi*, C-295/04-C-298/04, EU:C:2006:461, paragraph 21.

¹⁵⁰ Judgment in *Manfredi*, EU:C:2006:461, paragraph 61.

¹⁵¹ See LESKINEN, C., “The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 39.

¹⁵² Judgment in *Courage*, EU:C:2001:465, paragraph 29.

¹⁵³ E.g. Judgment in *Ireks-Arkady v Council and Commission*, C-238/78, EU:C:1979:226, paragraph 14, Judgment in *Hans Just US v Danish Ministry for Fiscal Affairs*, C-68/79 EU:C:1980:57, paragraph 26, and Judgment in *Michailidis*, C-441/98 and C-442/98, EU:C:2000:479, paragraph 31.

¹⁵⁴ Judgment in *Courage*, EU:C:2001:465, paragraph 30.

respected.¹⁵⁵ This means that the procedural rules governing antitrust damages actions may not be less favorable than those governing similar domestic actions (principle of equivalence), and that they may not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).¹⁵⁶ Therefore, national courts must abstain from applying any national rule that impedes the awarding of damages for antitrust violations, unless those rules are also permitted under EU law.¹⁵⁷ Arguably, this is also a logical consequence of the doctrine of supremacy of EU law, according to which EU law prevails over national law,¹⁵⁸ since it would not make much sense if Member States could undermine rights conferred by EU law by applying national rules, of substantive or procedural nature, which would hinder the enforcement of those rights.

The fact that national courts are entrusted the enforcement of Union rights is neither new nor surprising in the Union legal system since already in *van Gend & Loos*, the ECJ established the complementary nature of public and private enforcement of rights derived from Community [now Union] law by stating:

*“The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 [now 258 TFEU] and 170 [now 259 TFEU] to the diligence of the Commission and of the Member States”.*¹⁵⁹

¹⁵⁵ Judgment in *Courage*, EU:C:2001:465, paragraph 31. According to the ECJ, when assessing whether the claimant is entitled to compensation, the national court seized with the claim must take into account the economic and legal context in which the parties find themselves and the respective bargaining power and conduct of the two parties to the contract. The national court must, in particular, ascertain whether the claimant found himself in a markedly weaker position than the other party, which would seriously compromise or even eliminate “his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him”. Paragraphs 32-33.

¹⁵⁶ Judgment in *Palmisani v INPS*, C-261/95, EU:C:1997:351, paragraph 27, and Judgment in *Courage*, EU:C:2001:465, paragraph 29.

¹⁵⁷ See Judgment in *Courage*, EU:C:2001:465, paragraph 30, and LESKINEN, C., “The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 43. As mentioned above, national courts may, for instance, take steps to ensure that the protection of the rights guaranteed by EU law does not entail the unjust enrichment of those who enjoy them.

¹⁵⁸ See Judgment in *Costa*, 6/64, EU:C:1964:66, and CRAIG, P. and DE BÚRCA, G., *EU Law. Text, Cases and Materials*, 5th edition, Oxford University Press, Oxford New York, 2011, at p. 256-258.

¹⁵⁹ Judgment in *van Gend & Loos*, EU:C:1963:1.

But, the vigilance of individuals of the compliance with the EU antitrust rules by enforcing their Union right to damages for antitrust violations has not worked very well in practice. The under-enforcement of antitrust rules through private actions in the EU was revealed by a study on claims for damages in case of infringement of the EU antitrust rules that was commissioned by the Commission and was delivered by the Ashurst law firm in August 2004.¹⁶⁰ The study found that private enforcement in the EU showed an “*astonishing diversity and total underdevelopment*”.¹⁶¹ At the time of the report, it was estimated that damages actions had only been judged in around 60 cases.¹⁶²

Nevertheless, it should be noted that – contrary to the conclusion made in the Ashurst Study, according to which private enforcement throughout the EU would be underdeveloped¹⁶³ – Germany constitutes an exception because several hundred cases of civil proceedings are brought every year.¹⁶⁴ But most of the actions brought in Germany concern abuses of a dominant position or vertical agreements,¹⁶⁵ whereas victims of hardcore cartels have traditionally seldom been awarded damages.¹⁶⁶ Similarly, later research has also found more private litigation cases in Spain, France, the United Kingdom, the Netherlands, Belgium, Italy, Portugal and Sweden, although in many of the cases undertakings have used the competition rules as defenses to breach of contract claims.¹⁶⁷

¹⁶⁰ See WAELBROECK, D., SLATER, D. and EVEN-SHOSHAN, G., “*Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules*”, August 31st, 2004 (hereinafter “Ashurst Study”).

¹⁶¹ See Ashurst Study, at p. 1.

¹⁶² *Idem*.

¹⁶³ *Idem*.

¹⁶⁴ See BUNDESKARTELLAMT, “*Private Kartellrechtsdurchsetzung, Stand, Probleme, Perspektiven*”, Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005, at p. 4. See also *infra*, Section 3.3. “Germany”.

¹⁶⁵ RODGER, B.J., (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, Alphen aan den Rijn, 2014, at p. 146-147.

¹⁶⁶ See BÖGE, U., “Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 197-198.

¹⁶⁷ See AHRC Research Project on EU Competition Law: “*Comparative Private Enforcement and Collective Redress in the EU 1999-2012*” Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>, at p. 1.

However, in spite of the situation in some Member States, the overall scarcity of antitrust damages actions in the EU is at first sight surprising taking into account that the ECJ already held in *BRT v SABAM* that Articles 101 and 102 TFEU produce direct effects in relations between individuals and “*create direct rights in respect of the individuals concerned which the national courts must safeguard*”.¹⁶⁸ This can partly be explained by the Commission’s previous monopoly to grant an individual exemption for agreements infringing Article 101(1) TFEU, but satisfying the conditions of Article 101(3) TFEU, which tended to paralyze private actions pending before the national court until the Commission had dealt with the notification for exemption.¹⁶⁹ Consequently, private enforcement did not begin to receive more attention in Europe until the modernization of the EU antitrust rules took place, and facilitated the enforcement of Article 101 TFEU by national courts and, approximately at the same time, the ECJ held in *Courage* that any individual can rely on a breach of Article 101(1) TFEU before the national courts.¹⁷⁰

But despite the existence of a Union right to damages, the number of damages actions brought has been comparatively low in many Member States, even though there has been an increase after the modernization of the antitrust rules. Between May 1st, 2004 and the third quarter of 2007, 96 antitrust damages actions based on the EU competition rules or on both national and EU rules were brought.¹⁷¹ However, according to the External Impact Study on the White Paper prepared by the Centre for European Policy Studies, Erasmus University Rotterdam and LUISS Guido Carli, these actions were only brought in 10 Member States.¹⁷² The majority (61) of the actions brought concerned vertical restraints whereas only 13 concerned horizontal agreements, concerted practices

¹⁶⁸ Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 16.

¹⁶⁹ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 29.

¹⁷⁰ Judgment in *Courage*, EU:C:2001:465, paragraph 24.

¹⁷¹ See External Impact Study, at p. 38-39.

¹⁷² *Ibid.*, at p. 40. It should, nevertheless, be noted that this finding of the External Impact Study is not entirely accurate since, during the period examined in the study, damages actions were brought (although they were not resolved then), for example, in Finland, and Finland does not figure among the ten Member States enumerated in the study. See Case *Qvist v. John Crane Safematic*, The District Court of Central-Finland, No. 05/631, and Case *VPT v. Stora Enso*, District Court of Imatra, No. 04/597. It is therefore likely that some more damages actions were brought in that period, but it does not change the fact that the number is still likely to be modest. For more recent estimates, see the research project “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU*” described in the next paragraph.

or naked cartels. Actions based on an abuse of dominance accounted for 22 cases. No damages were awarded in the cases involving vertical restraints in final judgments, while 46% of the cartel cases and 55% of the abuse of dominance cases resulted in damages awards. As a consequence, antitrust damages actions are often not successful. In addition, stand-alone actions¹⁷³ are rare, and most of the actions brought tend to be follow-on¹⁷⁴ actions.¹⁷⁵ In other words, it is more common that damages actions are brought once the competition authorities have established the existence of an antitrust violation.

According to the research project “Competition Law: Comparative Private Enforcement and Collective Redress in the EU” regarding the period 1999-2012 led by Professor Barry Rodger and financed by the Arts and Humanities Research Council, there have been more private enforcement cases than estimated in particular in Germany, Spain, France United Kingdom, Netherlands, Belgium, Italy, Portugal and Sweden, although usually the competition law rules are used as a defense by companies in commercial contract disputes.¹⁷⁶ But the results (which are preliminary data and not strictly accurate) indicate that in many cases other remedies than damages were sought, or the damages claims were unsuccessful.¹⁷⁷ Overall, the research project concluded that private enforcement of competition law in the EU is “*a very mixed landscape*”.¹⁷⁸

¹⁷³ A stand-alone action refers to an action for damages that is brought when there is no prior decision from a competition authority finding an antitrust violation. *See* Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 18.

¹⁷⁴ The term “follow-on action” is used to describe an action for damages that is brought on the back of a decision adopted by public (competition) authorities. *See* Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 6-7.

¹⁷⁵ *See* External Impact Study, at p. 40.

¹⁷⁶ *See* AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012, Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>.

¹⁷⁷ *See* AHRC Project on Comparative Private Enforcement and Collective Redress, LSE September 15th Conference Rapporteur Presentations: Matrix of competition private enforcement cases from the 24 rapporteurs who presented at the conference, available at <http://www.clcpecreu.co.uk/pdf/LSEConferencePresentationNotes.pdf>.

¹⁷⁸ *See* AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012 Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>. This has been confirmed at least with regard to follow-on actions, since the Commission has estimated that between 2006 and 2012 claims for damages were brought as follow-on actions based on Commission Decisions only in seven Member States, most of them were brought in Germany, the United Kingdom and Netherlands. *See* Commission Staff Working

In order to find a solution to remedy the under-enforcement of antitrust rules in the EU, which the Ashurst Study had revealed,¹⁷⁹ as a first step, the Commission published a Green Paper on Damages actions for breach of the EC antitrust rules¹⁸⁰ and a Commission Staff Working Paper,¹⁸¹ an annex to the Green Paper, in December 2005. The Green Paper and the Commission Staff Working Paper address the conditions for bringing damages actions for breach of the EU antitrust rules. They also identify obstacles to the existing framework, and present different alternatives to solve the problems related to the current system with a view to facilitating private enforcement of EU competition law. The Green Paper was submitted to public consultation in order to stimulate debate and consult stakeholders on several possible options which could facilitate private damages actions.¹⁸²

In its 2007 Legislative and Work Program,¹⁸³ the Commission endorsed that a White Paper on damages actions for breach of the EU antitrust rules be prepared. It published a call for tenders for provision of an impact study on the White Paper in order to facilitate the preparation of the White Paper and the accompanying impact assessment.¹⁸⁴ The impact study was prepared by the Centre for European Policies Studies together with Erasmus University Rotterdam and Libera Università Internazionale degli Studi Sociali Guido Carli.¹⁸⁵ It analyzed the potential impact of more effective private damages

Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 19. Hereinafter this document will be referred to as “Impact Assessment Report on the Draft Directive”.

¹⁷⁹ See Ashurst Study, at p. 1.

¹⁸⁰ Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005.

¹⁸¹ Commission Staff Working Paper, SEC(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005.

¹⁸² See DG Competition’s web page on damages actions, available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

¹⁸³ See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions, Commission Legislative and Work Programme 2007, COM(2006) 629 final, 24.10.2006, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0629en01.pdf.

¹⁸⁴ See Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008, at p. 5.

¹⁸⁵ See External Impact Study.

actions based on the breach of antitrust rules in the EU, and assessed the available options to encourage meritorious damages actions before national courts of the Member States.¹⁸⁶ It found that several measures facilitating antitrust damages actions would ensure the adequate compensation for victims, enhance deterrence of unlawful conduct and have positive overall economic effects. Moreover, it identified the measures that were most likely to minimize negative effects.¹⁸⁷

This study then served as key input for the Commission when the latter prepared its Impact Assessment Report¹⁸⁸ accompanying the White Paper,¹⁸⁹ but the Commission conducted its own analysis of the study and the material gathered during consultation of various stakeholders. As a result, it partly reached divergent conclusions from those presented in the External Impact Study. The Impact Assessment Report analyzed a wide variety of different policy options.¹⁹⁰ The Commission stated that some of them could also be assessed by other Directorates-General of the Commission and, based on all these assessments, the Commission would closely coordinate various initiatives, in particular with regard to collective redress.¹⁹¹

In April 2008, the Commission published a White Paper on Damages actions for breach of the EC antitrust rules in which it presented policy options and specific measures that aimed to ensure that all victims of infringements of the EU antitrust rules would have access to effective redress mechanisms in order to obtain full compensation for the harm that they have suffered as a result of the infringements.¹⁹² The White Paper was

¹⁸⁶ *Ibid.*, at p. 27.

¹⁸⁷ See Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008, at p. 8.

¹⁸⁸ Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008.

¹⁸⁹ Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

¹⁹⁰ See Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact assessment, SEC(2008) 405, 2.4.2008, at p. 8.

¹⁹¹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 9.

¹⁹² See Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008.

accompanied by a Commission Staff Working Paper,¹⁹³ which developed the principles of the White Paper in more detail. The White Paper and the Commission Staff Working Paper were submitted to public consultation until mid-July 2008.¹⁹⁴

The Commission White Paper contained proposals and recommendations e.g. on standing, access to evidence through *inter partes* disclosure, collective actions, the passing-on defense, costs of damages actions, calculation of damages, and the interaction between damages actions and leniency programs.¹⁹⁵ For instance, the Commission proposed a minimum level of *inter partes* disclosure in antitrust damages cases when the claimant has been able to assert sufficient facts to establish a plausible claim that it has suffered some harm as a consequence of an antitrust violation. In addition, the claimant would have to demonstrate that it is unable to assert the specific facts or produce the means of evidence for which it is requesting disclosure, and must specify sufficiently precise categories of information or means of evidence to be disclosed. Finally, the court seized with the claim would have to verify whether the disclosure measure is relevant to the case, necessary and proportional in scope.¹⁹⁶

The Commission also suggested that victims of antitrust violations should be entitled to bring an “opt-in” collective action for damages or be represented in a representative action for damages by qualified entities. Qualified entities should include entities designated in advance by the Member States according to national procedures, representing legitimate and defined interests. Alternatively, other existing entities could be certified in order to bring a representative action in relation to a particular infringement on an *ad hoc* basis. This second option would be limited to entities whose primary task is to protect the defined interests of their members, such as trade associations defending the interests of their members, active in a given industry. Both forms of qualified entities that have standing in one Member State should also automatically be granted standing in all other Member States. These forms of collective

¹⁹³ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008.

¹⁹⁴ See <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

¹⁹⁵ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 12.

¹⁹⁶ *Ibid.*, at p. 31.

actions were to ensure a minimum level of protection, but Member States could decide to go beyond these types of actions conforming to their legal traditions.¹⁹⁷

As regards the distribution of damages in collective actions, the White Paper stated that, in case of representative actions, in principle, the damages should be used to compensate the harm suffered by those represented in the action. Only exceptionally could it be necessary to reflect on the possibility to award damages to the representative entity which would distribute the damages to related entities, or use them for related purposes.¹⁹⁸ In an opt-in collective action the damages would be awarded to the individually identified claimants according to the harm suffered by them.¹⁹⁹

Furthermore, the Commission proposed that final decisions by national competition authorities finding an infringement of Article 101 or 102 TFEU should have a binding effect on national courts when they decide an action for damages based on an infringement of the EU antitrust rules. Similarly, national courts should be bound by final rulings by review courts upholding a NCA decision, or themselves finding an infringement of Article 101 or 102 TFEU.²⁰⁰ The binding effect of NCA decisions would thus be similar to that of the Commission's own decisions but, under Article 267 TFEU, national courts could, and in certain situations must,²⁰¹ seek clarification on the interpretation of Article 101 or 102 TFEU made by the NCA.²⁰² In addition, it would be possible to make the binding effect of an NCA decision from another Member State

¹⁹⁷ *Ibid.*, at p. 18-20.

¹⁹⁸ The distribution of damages would hence be a *cy pres* distribution meaning that the damages are not distributed directly to those injured to compensate for the harm that they suffered but are used to achieve a result which is as close as possible. See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-20.

¹⁹⁹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

²⁰⁰ *Ibid.*, at p. 43-45.

²⁰¹ Pursuant to Article 267 TFEU, a court of a Member State against whose decisions there is no judicial remedy under national law must make a reference for a preliminary ruling to the ECJ if a decision on the question is necessary to enable it to give judgment.

²⁰² The aim of this proposal is to enhance the consistent application of the EU antitrust rules and relieve the claimants of the burden to demonstrate again the infringement that has already been established by the NCA. See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 43-45. Consequently, a national court seized with an antitrust damages claim would not have to re-examine whether an infringement of the antitrust rules exists, but would examine whether there is a causal relationship between the infringement and the alleged harm and, if that is so, decide the quantum of damages.

subject to the requirement that it be compatible with the public policy of the Member State where the damages claim is brought.²⁰³

As regards the requirement under national law of fault as a condition for a damages claim based on an infringement of Article 101 or 102 TFEU, the Commission maintained that it must be limited to very exceptional situations, and that once it has been proven that the defendant has infringed the EU antitrust rules, it could only escape liability if it could demonstrate that the infringement was the result of an excusable error. In order for the error to be considered excusable, the defendant must show that “*a reasonable person in the same circumstances applying a high standard of care could not reasonably have been aware that the conduct restricted competition*”.²⁰⁴

With regard to the scope and calculation of damages, the Commission argued that the Union *acquis* regarding the definition of damages should be codified in a Union legislative instrument in order to provide legal certainty, and it should constitute a minimum standard for the scope of damages.²⁰⁵ It recalled that the ECJ had confirmed in *Manfredi*²⁰⁶ that a victim of an antitrust violation has the right to obtain full compensation for the harm suffered, and that this includes compensation for both actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*) as well as interest.²⁰⁷ Moreover, the ECJ has not considered punitive damages to be contrary to European public order and, according to the principle of equivalence, they are therefore available for an infringement of the EU antitrust rules if they are available for an infringement of national competition law and are awarded in accordance with the general principles of EU law. The Commission concluded that the broad concept of full compensation does not exclude the calculation of antitrust damages by the *ex aequo et bono* method (i.e. the

²⁰³ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 48.

²⁰⁴ *Ibid.*, at p. 52-53.

²⁰⁵ *Ibid.*, at p. 58-59.

²⁰⁶ Judgment in *Manfredi*, EU:C:2006:461, paragraph 95.

²⁰⁷ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 56.

court could award a reasonable amount of damages which would be based on some economic approximation) or by using simplified rules of estimation.²⁰⁸

The White Paper also contained suggestions on how to treat the passing-on of overcharges to the next level in the production or distribution chain. It suggested that in order to ensure the full compensation of the *actual* [emphasis supplied] harm that the victim of an antitrust violation has suffered, the defendant must be able to invoke the passing-on defense against a claimant who is not a final consumer if the claimant has passed on to its clients the overcharge that it has paid because of the antitrust violation. The defendant must prove that the claimant has passed on the overcharge to the next level in the distribution chain and the extent to which it has passed on the overcharge. Furthermore, in order to guarantee the effectiveness of antitrust damages claims, the standard of proof should not be lower than the standard to which the claimant has to prove the existence and the amount of its damages.²⁰⁹

With a view to easing indirect purchasers' burden of proving the passing-on of the overcharge, the White Paper proposed that they could rely on rebuttable presumption that the overcharge that the defendant illegally imposed on the direct purchaser has been passed on in its entirety down to their level. However, the indirect purchaser must still prove the infringement, the existence of the initial overcharge as well as the damage that it has suffered. Finally, in order to avoid situations of over- and under-compensation

²⁰⁸ *Ibid.*, at p. 55-59. In addition, the Commission stated that it intended to issue pragmatic, non-binding guidance for the calculation of antitrust damages. *Ibid.*, at p. 60-61. To this aim, as a first step, it commissioned a study from Oxera, which was published in December 2009. See OXERA, "*Quantifying antitrust damages. Towards non-binding guidance for courts*", Study prepared for the European Commission, December 2009. Based on that study, the Commission published in 2011 a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union. See Draft Guidance Paper Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - Public Consultation, Brussels, June 2011. Finally, in June 2013, the Commission issued a communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, which were accompanied by a Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 TFEU. See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, p. 19-21; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

²⁰⁹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 64-65.

when purchasers at different levels in the distribution chain bring a joint action or parallel or consecutive actions for antitrust damages, the White Paper encouraged national courts to use all mechanisms available to that aim under national, Union or international law.²¹⁰

With regard to the costs of antitrust damages actions, the Commission recalled that these actions tend to be lengthy and complex, and their outcome can be difficult to assess. Thus, the fact that most Member States currently apply the “loser pays” principle and the claimant must pay certain fees in advance may discourage potential claimants from bringing an action if the court fees are high. However, the Commission did not propose any common Union rules regarding the costs of antitrust damages actions, but encouraged Member States to reflect on their cost rules in order to facilitate meritorious actions. It encouraged the Member States to design procedural rules that foster settlements, since settlements could mitigate the costs for antitrust damages actions,²¹¹ and to empower national courts to issue cost orders derogating from the normal cost rules. On the whole, the Commission encouraged the Member States to adjust their court fees so that they would not constitute a disincentive to antitrust damages actions.²¹²

Too short limitation periods could also constitute an obstacle to the recovery of antitrust damages. The White Paper therefore recalls the Union *acquis*, according to which limitation periods may not render antitrust damages actions practically impossible or excessively difficult, for instance, if a short limitation period starts to run from the moment in which the infringement began and cannot be suspended. In order to ensure effective antitrust damages actions, the Commission hence suggested that if the antitrust violation is continuous or repeated, the limitation period cannot start to run before the day on which the violation has ceased. Furthermore, it should not start to run before the victim of the antitrust violation can reasonably be expected to have knowledge of the infringement and of the harm it caused it. With regard to follow-on actions, the Commission also proposed that a new limitation period of at least two years would start

²¹⁰ *Ibid.*, at p. 66-68.

²¹¹ *Ibid.*, at p. 74-76.

²¹² *Ibid.*, at p. 79.

to run once the infringement decision on which the claimant relies its antitrust damages action has become final.²¹³

In addition, the White Paper aimed to ensure that private enforcement will not have negative effects on the public enforcement of the EU antitrust rules. The objective was to avoid that the risks of damages actions would discourage companies that have participated in cartels from informing the Commission by the means of leniency applications of the existence of those cartels.²¹⁴ In order to achieve this objective, the Commission stressed the need to protect the disclosure of corporate statements²¹⁵ submitted by leniency applicants by not making them available in antitrust damages actions. In the Commission's view, this protection should apply to all leniency applications related to an infringement of Article 101 TFEU, i.e. both to those submitted to the Commission and those submitted to a NCA, in order to increase legal certainty and the efficiency of the ECN. The Commission also wished to avoid that voluntary disclosure of corporate statements by leniency applicants would affect negatively on the competition authorities' investigations and, therefore, maintained that this must be precluded at least until the statement of objections has been issued. Finally, the Commission invited to further reflection on whether it would be possible to limit the *immunity* [emphasis supplied] recipient's civil liability to its direct and indirect contractual partners.²¹⁶

However, the White Paper did not contain any reference to the legal basis on which the Commission would base the proposed measures, but merely stated that the ECJ judgments *Courage* and *Manfredi* have indirectly confirmed the competence of the Union to adopt legislative measures aimed at making antitrust damages actions more effective.²¹⁷ On the other hand, even though procedural rules fall under Member States'

²¹³ *Ibid.*, at p. 70-73.

²¹⁴ *Ibid.*, at 84-85.

²¹⁵ By corporate statements the Commission refers to “*all those voluntary presentations, by or on behalf of an undertaking to the competition authority, of the undertaking's knowledge of a cartel and its role therein, which are drawn up specifically for submission under the Leniency Notice*”. See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 86.

²¹⁶ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 85-89.

²¹⁷ *Ibid.*, at p. 97, Note 164.

competence, this does not exclude the possibility of a harmonization at the Union level. For example, under Article 103 TFEU, the Council may lay down regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU and, therefore, it should be examined whether this article could constitute an appropriate legal basis for a harmonization of the national procedural rules governing antitrust damages actions.

In December 2008, the Committee on the Internal Market and Consumer Protection issued an opinion on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs. In general, it welcomed the Commission's proposals in the White Paper, but called on establishing two conditions for commencing collective actions, i.e. first, the merits of the action should be assessed by an appropriate national authorizing body and, second, there should be some preliminary attempt or recommendation to the parties to reach settlement through alternative dispute resolution.²¹⁸ On the whole, it considered that the Commission should encourage arrangements for out-of-court settlements. In addition, it found that Member States should take appropriate measures to reduce costs associated with antitrust damages actions, for example, by limiting the level of court fees.²¹⁹

In January 2009, the Committee on Legal Affairs issued its opinion on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs.²²⁰ The main suggestions which it made included the same type of recommendations regarding collective actions as the Committee on the Internal Market and Consumer Protection had proposed in its opinion. In addition, the Committee on Legal Affairs found that any proposal in that area should be based on a model that could also be applied to other kinds of disputes in order to provide judicial protection for consumers in similar cases.²²¹ Similarly, the court seized should have wide powers to

²¹⁸ See Opinion of the Internal Market and Consumer Protection Committee on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at § 6.

²¹⁹ *Ibid.*, at § 7-9.

²²⁰ Opinion of the Committee on Legal Affairs on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 22.1.2009.

²²¹ *Ibid.*, at § 2c).

deliver a preliminary ruling on the admissibility or inadmissibility of the case.²²² Furthermore, the Committee on Legal Affairs considered that it would be advantageous for victims of antitrust violations if undertakings offered a just settlement to them in exchange of a reduction in the fine imposed on them for that violation.²²³ It also expected that an independent cost/benefit analysis would be conducted before any legislative proposal.²²⁴

In March 2009, the European Economic and Social Committee (hereinafter “EESC”) issued its opinion on the White Paper on Antitrust Damages Actions.²²⁵ The Committee welcomed the Commission White Paper²²⁶ and was in favor of a more effective system allowing victims of antitrust violations to receive fair compensation for the damage suffered. It considered that the Commission should codify in a Union legislative instrument the Union *acquis* on the scope of damages that victims of antitrust violations can recover and draw up a framework with non-binding guidance for quantification of damages. Moreover, it invited the Commission to encourage the use of out-of-court systems in the EU and improve their quality, but noted that they can only offer a credible alternative for providing redress for victims if mechanisms for effective judicial redress by courts were available.²²⁷

As the other Committees which have issued opinions on the White Paper on Antitrust Damages Actions, the EESC also stressed the importance of coordinated collective redress for antitrust violations with other proposals on collective redress, i.e. those envisaged by the Directorate General for Health and Consumers (hereinafter “DG SANCO”). But it proposed that the Commission should clarify whether it would be possible to bring a representative action on behalf of a group of unidentified persons, since it considered that this possibility would be appropriate in certain circumstances involving a large number of victims. It was, however, opposed to the introduction of

²²² *Ibid.*, at § 4.

²²³ *Ibid.*, at § 6.

²²⁴ *Ibid.*, at § 7.

²²⁵ See Opinion of the European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules COM(2008) 165 final, *OJ C* 228, 25.3.2009, p. 40-46.

²²⁶ *Ibid.*, at p. 40.

²²⁷ *Ibid.*, at p. 42-43.

contingency fees in the EU,²²⁸ but believed that the Commission should examine the existing cost rules, and that meritorious actions should be allowed if costs otherwise prevented these claims from being brought. In addition, it suggested that notification and collection of putative claimants could be made through a public European electronic register of actions.²²⁹

End-March 2009, the Committee on Economic and Monetary Affairs published a report on the White Paper on Antitrust Damages Actions.²³⁰ The principles contained in that report were essentially adopted as such by the European Parliament in its resolution of March 26th, 2009 on the White Paper on Antitrust Damages Actions²³¹ and, therefore, instead of examining the report and resolution separately, the analysis will now focus on the resolution of the European Parliament. However, in this context, it is interesting to note that the rapporteur of the report of the Committee on Economic and Monetary Affairs doubts, first, that private-law enforcement mechanisms are under-developed in the Member States and, second, that the Commission has competence for its proposals on antitrust damages actions.²³² Arguably, his conclusions on both issues are incorrect, but this will be discussed further in Sections 3.2-3.7 and Chapter Four of the thesis. Similarly, *inter alia*, his arguments in favor of limiting collective actions to *opt-in* representative actions and *opt-in* collective actions, and not regulating access to evidence at the Union level²³³ will be examined and refuted in Chapters Four and Five.

On the whole, the European Parliament welcomed the White Paper and stressed the importance of ensuring effective enforcement of the EU antitrust rules by making it possible for victims of antitrust violations to claim compensation for the damage

²²⁸ *Ibid.*, at p. 44.

²²⁹ *Ibid.*, at p. 45-46. It should be noted that the suggestions and remarks of the EESC described here are not exhaustive, but only include some of the most interesting ones with regard to the Commission White Paper on Antitrust Damages Actions that do not fully accept the Commission's proposals, or add a new aspect, or are relevant taking into account the focus of this thesis.

²³⁰ COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, "Report on the White Paper on damages actions for breach of the EC antitrust rules" (2008/2154(INI)), March 9th, 2009.

²³¹ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).

²³² See COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, "Report on the White Paper on damages actions for breach of the EC antitrust rules" (2008/2154(INI)), March 9th, 2009, at p. 9.

²³³ *Ibid.*, at p. 9-10.

suffered.²³⁴ Nevertheless, it noted that the Commission had not specified a legal basis for its proposals, although they would intervene in national proceedings for non-contractual damages and national procedural law.²³⁵ The European Parliament recalled that existing obstacles to effective private enforcement of the EU antitrust rules, such as mass and dispersed damage and information asymmetries, also occur in other areas, for instance, product liability and other consumer-related actions. Thus, although it was in favor of setting up mechanisms to improve collective redress while avoiding excessive litigation, it highlighted that measures at Union level must not lead to arbitrary or unnecessary fragmentation of national procedural laws. The European Parliament therefore asked the Commission to examine the possible legal bases and how to proceed in a horizontal and integrated way. Moreover, the Commission should refrain from presenting any collective redress mechanism for antitrust damages without allowing the Parliament to participate in the adoption of it.²³⁶

Furthermore, the Parliament requested that only a clearly delimited group of claimants be eligible to participate in collective redress actions, and that the identification of the members of that group must be completed without unnecessary delay. The compensation must also be paid to the identified group of claimants, and qualified entities may be compensated only for the costs of bringing the action. The Parliament thus stressed that only damage actually suffered should be compensated.²³⁷

It is worth noting that the rapporteur of the report of the Committee on Economic and Monetary Affairs on the White Paper on Antitrust Damages Actions argued that the doctrine of *cy pres* would not be compatible with the principle of only compensating damage actually suffered since it would result in damage actually incurred not being compensated.²³⁸ Consequently, the rapporteur objected that a principle of *cy pres* be

²³⁴ See European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), at § 1.

²³⁵ *Ibid.*, at § 2.

²³⁶ *Ibid.*, at § 3-5.

²³⁷ *Ibid.*, at § 10.

²³⁸ See COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, “Report on the White Paper on damages actions for breach of the EC antitrust rules” (2008/2154(INI)), March 9th, 2009, at p. 10.

introduced,²³⁹ something that the Commission had proposed in its White Paper for exceptional situations where it would not be possible to directly compensate the damage suffered and, therefore, the representative entity would distribute the damages to related entities or use them for related purposes.²⁴⁰

In the Parliament's view, the merits of a collective action should be assessed in a preliminary stage of the procedure. On the whole, claimants in collective redress actions were to be treated identically with individual claimants.²⁴¹ Nonetheless, the European Parliament admitted that, given the more advanced analysis of civil competition law redress and the advanced framework of competition authorities, it would be justified to move forward rapidly in certain areas by already proposing sectoral measures with regard to the particular complexities and difficulties which victims of antitrust violations face. Some of these measures could then later be extended to other fields of law.²⁴²

The Parliament also considered that it would be desirable to achieve a "once-for-all settlement" for defendants in order to reduce uncertainty and exaggerated economic effects and, consequently, called for an assessment of a possible introduction of an out-of-court settlement for mass claims.²⁴³ In the Parliament's opinion, competition authorities should also take into account compensation paid or to be paid when determining the fine, which they intend to impose on antitrust infringers, but this should neither affect the full compensation of the damage caused by the antitrust violation nor endanger the deterrent effect of fines.²⁴⁴

According to the resolution, the Commission should, in principle, be obliged to allow victims of antitrust violations access to necessary information for prosecuting damages

²³⁹ See KORTMANN, J.S. and SWAAK, C.R.A., "The EC White Paper on antitrust damages actions: why the Member States are (right to be) less than enthusiastic", *E.C.L.R.*, Vol. 30, Issue 7, 2009, p. 340-351, at p. 344.

²⁴⁰ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 20.

²⁴¹ See European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), at § 12.

²⁴² *Ibid.*, at § 6.

²⁴³ *Ibid.*, at § 7.

²⁴⁴ *Ibid.*, at § 11.

actions since Article 15 TFEU [ex Article 255 EC] and Regulation (EC) No 1049/2001²⁴⁵ provide for a right of access to documents of the Union's institutions.²⁴⁶ Finally, the European Parliament insisted that any legislative proposal be preceded by an independent cost-benefit analysis.²⁴⁷

In May 2009, an unpublished Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty (hereinafter “the Failed Draft Directive”)²⁴⁸ was leaked to the press. It essentially built on the proposals in the White Paper, with a few exceptions, and, in addition, provided for additional safeguards regarding representative actions and access to evidence.²⁴⁹ Its aim was to ensure in all Member States access to effective redress mechanisms by reducing the main obstacles to victims' right to obtain compensation for antitrust damages, and to establish common minimum guarantees on antitrust damages actions. In this manner, the Failed Draft Directive aimed to give full effect to Articles 101 and 102 TFEU to create a level-playing field for undertakings and consumers.²⁵⁰

The Failed Draft Directive intended to take into account the feed-back received from stakeholders in the public consultations relating to the Green Paper and the White Paper. It maintained that the Commission's approach based on compensation found practically full support amongst stakeholders, whereas there were objections to measures which would primarily pursue an objective of deterrence through antitrust damages actions, such as opt-out class actions, pre-trial discovery and multiple damages.²⁵¹

²⁴⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L* 145, 31.5.2001, p. 43-48.

²⁴⁶ See European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), at § 13.

²⁴⁷ *Ibid.*, at § 24.

²⁴⁸ See Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty, Annex III of LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014.

²⁴⁹ Explanatory Memorandum on the Failed Draft Directive, at p. 5. The content of the Failed Directive will be analyzed in more detail in Chapter 4.

²⁵⁰ *Ibid.*, at p. 3.

²⁵¹ *Ibid.*, at p. 4.

However, the Failed Draft Directive was withdrawn by the Commission in October 2009²⁵² and it was not until June 2013 that another Draft Directive²⁵³ was published. The likely reason for the withdrawal is the lack of potential support amongst stakeholders as it was generally considered as controversial, especially by the business lobbies.

In December 2009, the external study “*Quantifying antitrust damages. Towards non-binding guidance for courts*” prepared for the European Commission by Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninou was published.²⁵⁴ The study provides a brief overview of the toolkit of economic methods, models and techniques for damages calculation in the context of private enforcement of the EU antitrust rules. In addition, it identifies some further insights provided by the economics and finance literature and legal precedent that can assist in calculating damages. The aim of the study is to assist the Commission in developing guidance for the calculation of antitrust damages.²⁵⁵

Drawing on the external study, the Commission published in 2011 a Draft Guidance Paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union,²⁵⁶ which was subject to a public consultation. The Guidance Paper aims to assist national courts and parties to damages actions by making information relevant for quantifying the harm caused by antitrust violations more widely available, including the existing key methods and

²⁵² See CHELLEL, K., “Competition class actions suffer setback as EU shuns directive” *The Lawyer*, October 6th, 2009.

²⁵³ Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013.

²⁵⁴ See OXERA, “*Quantifying antitrust damages. Towards non-binding guidance for courts*”, Study prepared for the European Commission, December 2009, available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

²⁵⁵ *Ibid.*, at p. i- ii.

²⁵⁶ Draft Guidance Paper Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union - Public Consultation, Brussels, June 2011, available at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

techniques to quantify such harm.²⁵⁷ A number of law firms, bar associations, public authorities, organizations and research institutions across the EU submitted their views on the Guidance Paper.²⁵⁸ A final version of the Guidance Paper²⁵⁹ was published in June 2013, and it was attached to a communication on quantifying harm in antitrust damages actions²⁶⁰ adopted by the Commission on the same day. The Communication refers to the main existing principles governing the quantification of damages, such as the right to full compensation for harm suffered as a result of an infringement of Article 101 or 102 TFEU, including the actual loss and loss of profit and interest, which are then further developed in the Practical Guide. However, the Practical Guide does not have a binding character, and it does not modify the national legal rules governing actions for damages or affect the rights and obligations of the Member States or natural or legal persons under EU law.²⁶¹

The latest developments on antitrust damages actions at the Union level relate to collective redress and the publication of a proposal for a Directive on Antitrust Damages Actions.²⁶² In 2011, the Commission held public a consultation on collective redress entitled ‘Towards a coherent European approach to collective redress’,²⁶³ with a view to, *inter alia*, identifying common legal principles on collective redress and exploring their adoption into the EU as well as the national legal systems.²⁶⁴ These

²⁵⁷ *Ibid.*, at p. 2.

²⁵⁸ See the contributions available at http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html#contributions.

²⁵⁹ Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

²⁶⁰ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ* C 167, 13.6.2013, p. 19-21.

²⁶¹ *Ibid.*, at point 12.

²⁶² See Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013.

²⁶³ COMMISSION STAFF WORKING DOCUMENT, PUBLIC CONSULTATION: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final, 4.2.2011.

²⁶⁴ The contributions to the public consultation have been evaluated by Prof. Dr. Burkhard Hess and the University of Heidelberg, but the Commission has stressed that the study does not necessarily reflect the Commission's own analysis of the contributions. See Study JUST/2010/JCIV/CT/0027/A4. Evaluation of

principles were intended to serve as guidance for an EU-wide legislative initiative called “An EU framework for collective redress”, foreseen in the Commission Work Programme 2012²⁶⁵ and which had been called for by the European Parliament.²⁶⁶ In addition, the Commission Work Programme 2012 envisaged a legislative initiative on actions for damages for breaches of antitrust law. The aim would be to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of private enforcement with public enforcement of the EU antitrust rules. However, according to the proposal, public enforcement should continue to have a central role in the EU.²⁶⁷

In this context, it is worth noting that in May 2012, the Heads of the European Competition Authorities issued a resolution on protection of leniency material in the context of civil damages actions.²⁶⁸ The resolution highlighted the need to protect leniency material against disclosure to the extent necessary to ensure the effectiveness of leniency programs. In this respect, the Vice-President of the European Commission responsible for Competition Policy, Joaquín Almunia, also stated that the Commission intended to propose legislation ensuring the right balance between the protection of leniency programs and the victims’ rights to obtain compensation.²⁶⁹

The resolution can be seen as a response to the *Pfleiderer* ruling of the Court of Justice in which the Court held that EU law on cartels and in particular Regulation 1/2003 do not preclude a victim of an infringement of the EU antitrust rules who is seeking to obtain damages from being granted access to documents relating to a leniency

contributions to the public consultation and hearing: “Towards a Coherent European Approach to Collective Redress”, available at http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_overview_en.pdf

²⁶⁵ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012, COM(2011) 777 final, Brussels, 15.11.2011, at p. 20.

²⁶⁶ See European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)), Brussels, 2.12.2012.

²⁶⁷ *Ibid*, at p. 3.

²⁶⁸ Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions, available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

²⁶⁹ See ALMUNIA, “Antitrust enforcement: Challenges old and new”, speech delivered at the 19th International Competition Law Forum, St. Gallen, June 8th, 2012.

procedure involving the infringer.²⁷⁰ Since there are no common rules on the right of access to documents relating to a leniency procedure, national courts must determine on the basis of national law the conditions under which access must be permitted or refused. They must weigh the interests protected by EU law in doing so. In other words, they must weigh the usefulness of leniency programs for detecting cartels against the contribution of damages actions for the maintenance of effective competition.²⁷¹ The result seems to be, that it is not certain that corporate statements will always be protected from disclosure to private litigants.²⁷² However, this will change when the Directive on Antitrust Damages Actions has been implemented, since it provides that access to corporate statements will not be granted.²⁷³

The European Parliament, in turn, issued in February 2012 a resolution on the Commission's proposal on adopting a legislative initiative on antitrust damages actions²⁷⁴ as well as one on collective redress.²⁷⁵ It seemed overall to be favorable to the adoption of a legislative initiative on antitrust damages actions and collective redress. Importantly, the Parliament recognized the specific nature of the antitrust field and the need to take it into account in adopting an instrument regarding collective redress,²⁷⁶ although it highlighted the need for a horizontal framework for collective actions in general and that specific rules should be constrained to a limited number of competition law or consumer protection issues.²⁷⁷ Nevertheless, it reiterated its view that collective redress should be based on an "opt-in" model so as to only allow clearly identified claimants to bring a collective action or public authorities or representative bodies to

²⁷⁰ See Judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 32.

²⁷¹ See Judgment in *Pfleiderer*, EU:C:2011:389, paragraph 30.

²⁷² This has been confirmed by the Court of Justice in *Donau Chemie* in which the Court held that refusal to grant access to documents relating to leniency proceedings to injured parties must be justified by overriding reasons relating to the effectiveness of the national leniency program, and the disclosure of the documents in question must actually undermine that public interest in order for the refusal to be justified. See Judgment in *Donau Chemie*, C-536/11, EU:C:2013:366, paragraphs 47-48.

²⁷³ See Article 6(6) of the Directive on Antitrust Damages Actions.

²⁷⁴ European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)), Brussels, 2.12.2012.

²⁷⁵ European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), Brussels, 2.12.2012.

²⁷⁶ European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)), Brussels, 2.12.2012, at § 24.

²⁷⁷ European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)), Brussels, 2.12.2012, at § 15-17.

bring an action on behalf of such claimants. The Parliament was also opposed to contingency fees as well as third-party funding of antitrust damages actions.²⁷⁸ Similarly, it rejected the introduction of discovery.²⁷⁹ With regard to the interaction between public and private enforcement, the Parliament believed that the Commission should ensure that fines would take into account any compensation already paid to third parties.²⁸⁰

Moreover, a study entitled “Collective Redress in Antitrust”²⁸¹ was delivered in June 2012 in order to take into account the issues raised by the European Parliament’s Committee on Economic and Monetary Affairs in its opinion of October 20th, 2011 on the Commission Staff Working Document ‘Towards a coherent European approach to collective redress’. The study aimed to analyze and develop the issues of collective redress in the field of antitrust taking into account the views expressed by the Committee.²⁸² It recommended, *inter alia*, that a collective redress system for antitrust actions should be introduced through a sector-specific measure in order to be efficient, and should be based on Article 103 TFEU. The preferred legal instrument should be a regulation in order to create a uniform, efficient EU procedural instrument. The study advocated for the adoption of a collective redress model based on the “opt-in” principle, with the exception of some clear and limited situations, for example, involving consumers suffering harm of low value. It also supported more flexibility concerning funding and did not believe that contingency fees alone, without some other procedural mechanisms available in the United States, would automatically lead to excessive litigation. According to the study, the possibility of reducing the civil responsibility of the first leniency applicant should also be contemplated as damages may reduce the attractiveness of leniency programs.²⁸³ Although these are only some of the recommendations included in the study, they are of particular interest because many of

²⁷⁸ European Parliament resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)), Brussels, 2.12.2012, at § 25-26.

²⁷⁹ European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)), Brussels, 2.12.2012, at § 20.

²⁸⁰ *Ibid.*, at § 32.

²⁸¹ BUCCIROSSI, P., CARPAGNANO, M., CIARI, L., TOGNONI, M. and VITALE, C., “*Collective Redress in Antitrust*” Study, IP/A/ECON/ST/2011-19, June 2012.

²⁸² *Ibid.*, at p. 15.

²⁸³ *Ibid.*, at p. 88-90.

them are contrary to the points raised by the European Parliament in its resolutions regarding antitrust damages actions and collective redress.²⁸⁴

The most significant development is the publication of a proposal for a Directive on Antitrust Damages Actions.²⁸⁵ The Draft Directive on rules governing antitrust damages actions aims to ensure the effective enforcement of the EU competition rules by optimizing the interaction between public and private enforcement of competition law and ensuring that victims of EU antitrust violations can obtain full compensation for the harm that they have suffered.²⁸⁶ The proposed harmonized rules will not only apply to damages actions for breaches of the EU competition rules, but also of national competition rules when they are applied in parallel with Articles 101 and 102 TFEU.²⁸⁷

The Draft Directive was modified during the ordinary legislative procedure and a text agreed on by the Council and the European Parliament was adopted by the Parliament on April 17th, 2014.²⁸⁸ During the ordinary legislative procedure, the Council adopted its general approach on the Commission's proposal on December 2nd, 2013. The amendments proposed by the Presidency included allowing Member States to protect documents which have been obtained solely through access to the file of a competition authority,²⁸⁹ and the removal of the cross-border binding effect of national decisions. Instead, Member States would be obliged to accept such decisions as means of evidence. The protection of leniency applicants against civil liability was limited to what is necessary to neutralize the negative effects of damages actions on leniency programs and public enforcement.²⁹⁰ On January 27th, 2014, the ECON Committee of

²⁸⁴ These recommendations will be analyzed in more detail in Chapter Five.

²⁸⁵ See Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013.

²⁸⁶ *Ibid.*, at p. 2-3.

²⁸⁷ *Ibid.*, at p. 23.

²⁸⁸ See the amended text available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

²⁸⁹ See COUNCIL OF THE EUROPEAN UNION, General Approach on the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2013/01285 (COD), 27.11.2013, at p. 2.

²⁹⁰ *Ibid.*, at p. 3.

the European Parliament adopted its Report on the Proposal²⁹¹ which includes the opinions of the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection.²⁹² In order to reach an agreement on the text, three political trilogues²⁹³ and several technical meetings took place in February and March 2014.²⁹⁴ A text was agreed on March 20th, 2014 and it was endorsed by COREPER on March 26th, 2014.²⁹⁵ Following the adoption by the European Parliament, the text still requires the final approval of the Council.

The proposals contained in the Draft Directive proposed by the Commission and the Directive on Antitrust Damages Actions adopted by the European Parliament (pending the final approval of the Council) will be analyzed in more detail in Chapter Four. Next, only a brief overview of the main features of the Directive on Antitrust Damages Actions will be given.

The Directive on Antitrust Damages Actions provides for a minimum level of disclosure of evidence if the claimant has presented reasonably available facts and evidence showing the plausibility of its claim for damages.²⁹⁶ National courts can then order the defendant or third party to disclose relevant evidence in their control. The party requesting disclosure of evidence must specify either pieces of this evidence or relevant categories of this evidence defined as precisely and narrowly as possible on the basis of reasonably available facts. The disclosure of evidence must also be limited to what is proportionate. There must also be effective measures to protect confidential information and to give full effect to professional privilege. Moreover, national courts can never order the disclosure of leniency corporate statements and settlement submissions.²⁹⁷ Member States must also provide for penalties for failure or refusal to

²⁹¹ See THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, Report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404 – C7-0170/2013 – 2013/0185(COD), 27.1.2014.

²⁹² The opinions of the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection will be commented upon in Chapter Four.

²⁹³ I.e. meetings of representatives of the European Parliament, the Council and the Commission.

²⁹⁴ See http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html.

²⁹⁵ See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/141926.pdf.

²⁹⁶ Article 5 of the Directive on Antitrust Damages Actions.

²⁹⁷ Article 6 of the Directive on Antitrust Damages Actions.

comply with a disclosure order, the destruction of relevant evidence, failure or refusal to comply with an obligation to protect confidential information, or breach of limits on the use of evidence.²⁹⁸

The Directive on Antitrust Damages Actions also proposes that final infringement decisions by a national competition authority will have a probative effect in subsequent damages actions brought in the same Member State as far as the finding of an infringement is concerned. However, final decisions by NCAS in other Member States have only to be considered as *prima facie* evidence that an infringement of competition law has occurred.²⁹⁹

The limitation period must be at least five years from the moment when the infringement has ceased and the claimant knows or can reasonably be expected to have the knowledge of the infringement, the harm it caused and the identity of the infringer. Moreover, the limitation period for a follow-on action must be suspended or interrupted until at least one year after the decision by the competition authority in question is final or proceedings are otherwise terminated.³⁰⁰

The Directive on Antitrust Damages Actions establishes that undertakings are jointly and severally liable for harm caused by their joint behavior. However, an undertaking which has been granted immunity under a leniency program will be liable to injured parties other than its direct or indirect purchasers or providers only if they were unable to obtain full compensation from the other infringers. An infringing undertaking may recover a contribution from any other infringing undertaking which corresponds to their relative responsibility for the harm caused by the antitrust violation.³⁰¹

According to the Directive on Antitrust Damages Actions, the passing-on defense is allowed, but the infringer has the burden of proof that the overcharge has been passed on.³⁰² As to the quantification of harm, the Directive contains a rebuttable presumption

²⁹⁸ Article 8 of the Directive on Antitrust Damages Actions.

²⁹⁹ Article 9 of the Directive on Antitrust Damages Actions.

³⁰⁰ Article 10 of the Directive on Antitrust Damages Actions.

³⁰¹ Article 11 of the Directive on Antitrust Damages Actions.

³⁰² Article 13 of the Directive on Antitrust Damages Actions.

of harm resulting from a cartel.³⁰³ Antitrust harm is quantified on the basis of national rules, which must comply with the principles of equivalence and effectiveness. If the actual situation has to be compared with a hypothetical one, the national courts must be able to estimate the harm in order not to make the right to damages practically impossible or excessively difficult.³⁰⁴

The Directive also aims to encourage consensual dispute resolution by suspending the limitation period during the consensual dispute resolution process.³⁰⁵ Similarly, Member States are to ensure that national courts may suspend antitrust damages proceedings in case the parties to those proceedings are involved in consensual dispute resolution concerning the same damages claim. Finally, the claim of an injured party which settles is reduced with the settling co-infringer's share of the harm inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim of the settling injured party.³⁰⁶

It is important to note that the Directive does not include all the measures suggested in the White Paper on Damages actions for breach of the EC antitrust rules or the Failed Draft Directive of 2009. For instance, it does not provide for collective redress, or contain rules regarding the fault requirement or costs of antitrust damages actions. The White Paper therefore continues to be of interest for the purpose of examining how the private enforcement of the EU antitrust rules could be enhanced in the future, as the Directive on Antitrust Damages Actions is arguably insufficient to bring about a significant change at least regarding damages claims brought by consumers.

However, as to collective redress, the Commission has adopted recommendations on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of the rights granted under Union law.³⁰⁷ These recommendations concern collective redress mechanisms for violations of rights

³⁰³ Article 17 of the Directive on Antitrust Damages Actions.

³⁰⁴ Directive on Antitrust Damages Actions, at p. 29.

³⁰⁵ Article 18 of the Directive on Antitrust Damages Actions.

³⁰⁶ Article 19 of the Directive of Antitrust Damages Actions.

³⁰⁷ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

granted under EU law, in other words, they do not only apply to antitrust violations, but mass harm situations caused by violations of rights granted under EU law in general. Their purpose is to facilitate access to justice, put an end to illegal practices, and allow the compensation of victims of violations of rights granted by EU law in mass harm situations.³⁰⁸ They recommend that Member States should empower representative entities to bring representative actions and/or empower public authorities to bring such actions.³⁰⁹ Alternatively, a collective redress action may be brought by two or more natural or legal persons who have been harmed in a mass harm situation.³¹⁰ These actions should, as a general rule, be based on the “opt-in” principle.³¹¹ The recommendations also deal with the criteria of admissibility of collective actions, funding, representation and lawyers’ fees, follow-on actions and cross-border cases, to name some of the issues covered by the recommendations. These will be analyzed in-depth in Chapter Five. At this point it should only be pointed out that the main problem is that the recommendations are not binding, so it is debatable that they will really serve to improve much the compensation of consumers who have suffered harm as a result of an antitrust violation.

Apart from the initiatives mentioned above, the Commission also assists national courts in the application of Articles 101 and 102 TFEU, for example, by providing a funding program for training of national judges and judicial cooperation between national judges in EU competition law.³¹²

In light of the Directive on Antitrust Damages Actions and the Recommendation on Collective Redress Mechanisms as well as the views expressed by stakeholders during the consultation procedure, the questions crucial to examine for the purpose of this thesis concern, above all, access to evidence and the interaction between public and private enforcement, the funding and costs of antitrust damages actions, the damages available for antitrust violations and the necessity to introduce a collective redress mechanism and an out-of-court settlement procedure. With regard to collective redress,

³⁰⁸ Point 1 of the Recommendation on Collective Redress Mechanisms.

³⁰⁹ Points 4 and 6 of the Recommendation on Collective Redress Mechanisms.

³¹⁰ Point 3a) of the Recommendation on Collective Redress Mechanisms.

³¹¹ Point 21 of the Recommendation on Collective Redress Mechanisms.

³¹² See <http://ec.europa.eu/competition/court/training.html>.

the choice between a horizontal and a sectoral legislative approach as well as the existence of a legal basis for a possible binding EU collective redress action should, in particular, be examined.

The Commission Recommendation on Collective Redress Mechanisms and the obligation of minimum level of disclosure in the Directive on Antitrust Damages Actions are of particular interest for this thesis because class actions and discovery are distinctive features of antitrust enforcement in the United States and Canada. Much could therefore be learned from the U.S. and Canadian experiences of these procedural devices, taking into consideration the long and extensive experience of private enforcement of antitrust rules especially in the United States.

Similarly, the significance of treble damages³¹³ and contingency fees in private litigation should be examined since antitrust damages actions are significantly more frequent in the United States, where treble damages and contingency fees are available, and the cost rules and damages awards are likely to contribute to this result. It is worth noting that these issues have not been included in the Directive on Antitrust Damages Actions, and the Recommendation on Collective Redress Mechanisms even state that punitive damages should be prohibited.³¹⁴ There is hence a call to examine whether some of the available procedural mechanisms in the United States and Canada could also serve to enhance private enforcement of antitrust rules in the EU and especially improve the possibilities of injured consumers obtaining compensation for the loss that they have suffered as a result of antitrust violations.

³¹³ Treble damages are only available in the United States, whereas Canadian courts seldom award punitive damages. *See* WATSON, G. D., “Class actions: the Canadian experience, 11 *Duke J. Comp. & Int’l L.*, Spring/Summer 2001, p. 269-287, at p. 269. But tort claims based on common law may also allow punitive damages which are not available under Section 36 of the Canadian Competition Act. *See* HOOD, J., KENT, D. and LOW, M., “Canada: Private Antitrust Litigation”, *The Antitrust Review of the Americas* 2011.

³¹⁴ Point 31 of the Recommendation on Collective Redress Mechanisms.

2.2. At Member State Level

At the national level, several Member States have in the last decade introduced competition law reforms the aim of which includes facilitating antitrust damages actions.³¹⁵

In Germany, the 7th Amendment to the German Competition Act³¹⁶ conferred a right to compensation to persons affected by a breach of the German or EU antitrust rules.³¹⁷ This has made it easier to bring damages actions since the reform has abolished the previous requirement that a provision that serves to protect another person must have been violated before a claim for damages can be brought. The latest 8th amendment to the German Competition Act,³¹⁸ which entered into force on June 30th, 2013, now also allows consumer associations to order the infringing undertaking to pay an amount equivalent to the additional illegal proceeds to the Treasury in certain circumstances.³¹⁹

Moreover, not only Commission Decisions, but also NCA Decisions and decisions of the courts of the Member States that establish an infringement of Article 101 or 102 TFEU are binding on the courts before which antitrust damages actions are brought as regards the existence of the infringement.³²⁰ Similarly, the decisions of the German

³¹⁵ The examples provided in this section are not exhaustive, but only indicative of some of the main reforms relating to private antitrust enforcement implemented in the selected Member States as well as in Italy, and they will be discussed in more detail in Chapter Three.

³¹⁶ The 7th Amendment to the German Act Against Restraints of Competition.

³¹⁷ Section 33(1) of the German Act Against Restraints of Competition.

³¹⁸ 8th Amendment to the German Act Against Restraints of Competition.

³¹⁹ Section 34a of the German Act Against Restraints of Competition.

³²⁰ Section 33(4) of the German Act Against Restraints of Competition. As regards Commission Decisions, the reference to their binding character is merely aimed at providing a clarification, since these decisions already bind national courts pursuant to Article 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1*, 4.1.2003, p. 1-25. The extension of the binding effect to decisions by foreign competition authorities and courts was criticized by the Monopolies Commission during the elaboration of the 7th Amendment of the German Competition Act, since the binding effect of administrative decisions is not limited to claims against parties addressed by the decision. Consequently, even parties that are not addressees of the decision or could not duly participate in the administrative proceedings will not be able to defend themselves against the alleged antitrust violation before German courts. See WURMNEST, W., “A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition”, *German Law Journal*, Vol. 06, No. 08, 2005, p. 1173-1190, at p. 1186. According to the Monopolies Commission, the binding effect should be limited to the addressees of the decision since these are the only ones that can appeal the decision. Moreover, in this manner there would be larger incentives for companies to apply for leniency. See MONOPOLKOMMISSION, “*Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*”, Sondergutachten der Monopolkommission gemäß § 44. Abs. 1 Satz 4 GWB, at p. 24.

competition authority finding an infringement of the German antitrust rules will bind German courts – as far as the existence of an infringement is concerned – when they decide private damages claims.

In Spain, the main change with regard to private enforcement brought about by the new Competition Act 15/2007 of July 3rd is that the Commercial Courts may now directly apply Articles 1 and 2 of the new Competition Act, i.e. the equivalents of Articles 101 and 102 TFEU. Contrary to the old Competition Act, under which a final administrative decision finding an infringement had to exist before a damages action could be brought,³²¹ under the new law, the Commercial Courts can also award damages to victims of antitrust violations when the damages claims are based on national competition law, even if no final administrative decision finding an infringement exists.³²²

Sweden introduced important amendments to its Competition Act in 2005, for instance, by expanding the sphere of those entitled to damages for antitrust violations. Previously, only undertakings and contracting parties had been entitled to seek compensation,³²³ but thanks to the amendments, this limitation has been removed from the Competition Act, and any injured party is entitled to damages. The limitation period was also extended from five to ten years³²⁴ calculated from the time when the damage was caused.³²⁵ Moreover, the Swedish Group Proceedings Act 2002 introduced collective actions based on an “opt-in” model.³²⁶ Under this act, the group action can be brought as a private group action, an organization action or a public group action.³²⁷ The private

³²¹ Article 13(2) of Competition Act 16/1989 of July 17th.

³²² This is the case because the law provides that Commercial Courts have jurisdiction in civil actions concerning the application of Articles 1 and 2 of the Competition Act and does not include any requirement that a previous final administrative decision exist. *See* First Additional Provision of Competition Act 15/2007 of July 3rd, Official State Gazette No. 159, of July 4th, 2007.

³²³ *See* ANDERSSON, H., and LEGNERFÄLT, E., “Effective private enforcement: The Swedish experience, a lesson for the EU?”, *Concurrences*, N° 3-2009, p. 156-162, at p. 158.

³²⁴ *Idem*.

³²⁵ Section 25 of the Competition Act (2008:579) as amended by Law (2010:642).

³²⁶ Group Proceedings Act (2002:599).

³²⁷ Section 1 of the Group Proceedings Act (2002:599).

group action may be brought by natural persons or a legal entity³²⁸ and is also available in antitrust damages cases.

In Finland, a new Competition Act (948/2011) entered into force on November 1, 2011 and it also includes amendments regarding antitrust damages actions. The amendments concerning damages claims are similar to the amendments introduced by Sweden in 2005 in that the standing for bringing an antitrust damages action has been expanded to anyone who has suffered harm as a result of an antitrust violation.³²⁹ The new Act has also clarified the limitation periods of bringing antitrust damages actions with regard to the moment when the limitation periods will start to run and will end.³³⁰ The right to seek damages will expire if the action for damages has not been brought within ten years from the day when the antitrust violation occurred. In case of a continuous infringement, the limitation period will expire ten years from the day when the violation ended. For follow-on actions, a one-year limitation period will, however, start running once the decision on which the damages action is based has become final.³³¹

Collective actions are also in principle possible following the adoption the Act on Class Actions (444/2007). But only the Consumer Ombudsman may bring a collective action on behalf of a group of consumers in mass consumer disputes between consumers and a trader.³³² The collective action is based on an opt-in model and to date no antitrust collective actions have been brought.

Italy has introduced a collective action by Law No. 99/09 of July 23rd, 2009, which has amended the Consumer Act.³³³ Article 140 *bis* of the Consumer Act was amended in 2012 in order to enable collective damages claims to protect homogenous individual

³²⁸ Sections 1 and 4 of the Group Proceedings Act (2002:599).

³²⁹ Section 50 of the Competition Act (948/2011).

³³⁰ Government Bill 88/2010 on a new Competition Act, at p. 1.

³³¹ Section 20 of the Competition Act (948/2011).

³³² Section 1 of the Act on Class Actions (444/2007).

³³³ Article 49 of Law No. 99/09 of July 23rd, 2009 Provisions on the development and internationalization of undertakings, as well as in the field of energy, published in the Official Gazette No. 176 of July 31st, 2009.

rights and collective interests.³³⁴ Before the amendment, such actions could only be brought to protect identical individual rights.

Also in France has a collective action recently been introduced following the adoption of the Consumer Act.³³⁵ The act allows, *inter alia*, collective follow-on actions after a decision of French or EU competition authorities.³³⁶ However, only national consumer associations may bring such a claim and solely on behalf of consumers who have decided to opt in.³³⁷

Interestingly, in the United Kingdom, several proposals to reform collective actions for antitrust damages have been made. In 2007, the Office of Fair Trading published recommendations on ways of enhancing redress for individuals harmed by breaches of competition law.³³⁸ The OFT recommended that representative actions for damages should be possible for consumers as well as businesses, both as stand-alone and follow-on actions, because both consumers and businesses face obstacles to private redress.³³⁹

In 2012, the BIS (Department for Business Innovation & Skills) published its consultation on options for reform of private enforcement.³⁴⁰ Regarding collective actions, the consultation focused on who should be allowed to bring such actions and whether they should be brought as follow-on actions or whether stand-alone actions should also be permitted. Moreover, it dealt with the issue of opt-in or opt-out actions and even presented a model somewhat in-between these two models: parties would be required to join the action in order to be represented by the group, but they would be

³³⁴ Law No. 1/12 of January 24th, 2012, Urgent provisions for competition, the development of infrastructure and competitiveness, published in the Official Gazette No. 19 of January 24th, 2012.

³³⁵ Law No. 2014-344 of March 17th, 2014 on consumer protection.

³³⁶ Articles L. 423-1 and L. 423-17.

³³⁷ Article L. 423-1.

³³⁸ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Recommendations from the Office of Fair Trading, OFT916resp, November 2007.

³³⁹ *Ibid.*, at p. 23.

³⁴⁰ DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform*”, April 2012.

able to do so even after liability had been determined, provided that damages had not yet been quantified.³⁴¹

The response of the UK Government to the consultation was published in January 2013.³⁴² As to collective actions, both stand-alone and follow-on collective actions will be introduced and they are to be brought before the Competition Appeal Tribunal. The Competition Appeal Tribunal will have to certify the group and decide on whether the collective action should be brought as an opt-in or opt-out action. Moreover, collective actions could only be brought by claimants or “genuine representatives” of the group – i.e. trade associations or consumer organizations. In addition, the UK Government will also introduce an opt-out collective settlement system for competition law in the Competition Appeal Tribunal.³⁴³

The developments both at the Union and national level indicate that private enforcement is likely to be under examination in the EU for some time. Arguably, the Directive on Antitrust Damages Actions and the Recommendation on Collective Redress Mechanisms will not be sufficient to enhance private enforcement in the EU, at least not for consumers, since a number of issues have not been satisfactorily addressed.³⁴⁴ Therefore, this thesis aims to examine how to optimally improve private enforcement of the EU antitrust rules in the long-term, and to make proposals for the reforms required to enhance the rules applicable to private enforcement in the EU, and to ensure effective access to justice.

Furthermore, as private enforcement in the form of antitrust damages actions currently still accounts for a modest part of competition law enforcement in many Member States³⁴⁵ and in particular damages claims by consumers are seldom brought,³⁴⁶ it is

³⁴¹ *Ibid.*, p. 29-31

³⁴² DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013.

³⁴³ *Ibid.*, at p. 31-34.

³⁴⁴ For more details, see Chapters Four and Five.

³⁴⁵ See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 19.

clear that more effective redress mechanisms are needed in order to compensate especially consumers injured by antitrust violations. Introducing effective EU collective actions and ensuring the financing of such actions could be a means to encourage private enforcement, and increase the likely-hood of victims obtaining compensation. This in turn would require a further harmonization of certain national procedural rules in the EU.

³⁴⁶ AHRC Research Project on EU Competition Law: “*Comparative Private Enforcement and Collective Redress in the EU 1999-2012*” Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>.

PART I: THE FLAWS IN THE EU PRIVATE ANTITRUST ENFORCEMENT MODEL AND THE NEED FOR HARMONIZATION

3. OBSTACLES TO PRIVATE ENFORCEMENT IN THE EU

3.1. General overview

In the light of EU case law, it is today clear that a Union right to damages for infringements of the EU antitrust rules exists. This has expressly been confirmed by the ECJ in *Courage*³⁴⁷ and in *Manfredi*.³⁴⁸ Thus, any individual that has been harmed as a result of a breach of the EU antitrust rules may bring an antitrust damages action before the national courts in order to seek compensation for the loss that he has suffered regardless of whether he is a co-contracting party to the illegal agreement or a third party.³⁴⁹

However, as antitrust damages actions are currently governed by national procedural rules, in practice, the possibilities of bringing antitrust damages actions vary from Member State to Member State.³⁵⁰ In fact, the overall number of private antitrust damages actions is still low in the EU despite the existence of a Union right to damages. Based on available data, the Commission has estimated that between 2006 and 2012, only 52 actions for damages were brought as follow-on actions based on Commission Decisions in seven Member States. It is noteworthy that most of them were brought in Germany, the United Kingdom and Netherlands, which constitute the main exceptions to the overall low number of antitrust damages actions. In the rest of the Member States there appear to have been no follow-on actions based on a Commission Decision during

³⁴⁷ See Judgment in *Courage*, EU:C:2001:465, paragraph 24.

³⁴⁸ See Judgment in *Manfredi*, EU:C:2006:461, paragraph 61.

³⁴⁹ Recently, the Court of Justice held that an injured party does in principle even have a right to claim compensation from cartel members from loss resulting from umbrella pricing by an undertaking not party to the cartel. See Judgment in *ÖBB-Infrastruktur*, C-557/12, EU:C:2014:1317, paragraph 37.

³⁵⁰ For instance, the limitation periods for follow-on actions for damages vary from six months to five years. See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 16. Hereinafter this document will be referred to as “Impact Assessment Report on the Draft Directive”.

the period examined.³⁵¹ This is the case even though Articles 101 and 102 TFEU have direct effect,³⁵² and according to the principles of equivalence and effectiveness of EU law, Member States must ensure the same treatment of actions for safeguarding rights derived directly from EU law and similar domestic actions as well as the effective exercise of those rights.³⁵³ Moreover, under Article 4(3) TEU, Member States have an obligation to ensure the application of EU law and to refrain from measures which could jeopardize the attainment of the Union's objectives. They must therefore protect rights conferred to individuals by the Treaties and, if necessary, set aside contrary national provisions, since EU law prevails over national law.³⁵⁴

Divergent national tort and procedural rules could explain why private enforcement in Europe is remarkably lagging behind the United States where private antitrust enforcement accounts for more than 90% of the total antitrust enforcement.³⁵⁵ Furthermore, the incentives to bring damages actions are small in the EU, since the difficulties of proving the infringement and the uncertainty in the outcome of the action make bringing an antitrust damages action too difficult or not attractive enough.³⁵⁶

In 2005, the Commission Green Paper on Damages actions for breach of the EC antitrust rules, which was elaborated using the Ashurst Study as reference, found that the obstacles to bringing antitrust damages actions relate, *inter alia*, to access to evidence, the burden of proof, the fault requirement, the definition and quantification of damages, the passing-on defense and indirect purchaser standing, collective actions, costs of actions and limitation periods.³⁵⁷

³⁵¹ See Impact Assessment Report on the Draft Directive, at p. 19.

³⁵² I.e. individuals can rely on them to enforce their rights before national courts. See Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 16.

³⁵³ See Judgment in *Courage*, EU:C:2001:465, paragraph 29.

³⁵⁴ See Judgment in *Simmenthal*, C-106/77, EU:C:1978:49, paragraphs 17 and 21.

³⁵⁵ See LANDE, R.H., "Benefits of private enforcement: empirical background" in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

³⁵⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

³⁵⁷ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 12-14.

Arguably, the limited access to evidence – combined with a high burden of proof of causation and damage which rests on the claimant – constitutes the main obstacle to private enforcement. The claimant must quantify the damages which is a difficult task, for instance, when the claimant must show the difference between the overcharge that it has paid due to a cartelized price and the fictional price that it would have paid were it not for the existence of the cartel in question. In order to demonstrate the actual harm that it has suffered, the claimant would, *inter alia*, need access to evidence relating to the commercial activities and trading practices of actual and potential market players. However, this information is usually in the hands of the defendant or third parties. Consequently, there is often a striking information asymmetry between the claimant and the defendant,³⁵⁸ which makes it difficult for the claimant to bring its damages claim successfully.

As regards the availability of collective actions, already in 2003, the Ashurst Study found that some sort of collective or representative actions existed in nearly all Member States. Nevertheless, they cannot always be used to claim damages, but often they can only be brought in order to request injunctive relief.³⁵⁹ Furthermore, collective or representative actions have mainly been brought in financial services cases, and are often based on unfair contractual terms. Thus, they are not common in antitrust damages cases. But there has been some development in this area and increasingly more Member States provide for collective actions. However, only few jurisdictions have specific legislation expressly providing for representative damages actions in case of breach of the antitrust rules,³⁶⁰ whereas other Member States either do not limit the types of claims that can be brought by the use of collective actions, or limit collective actions to specific subject matters, which so far do not include damages claims based on antitrust violations.³⁶¹

³⁵⁸ *Ibid.*, at p. 17.

³⁵⁹ See Ashurst Study, at p. 46-47. For instance, this is the case in Germany.

³⁶⁰ In the United Kingdom, representative follow-on actions can be brought before the Competition Appeal Tribunal. See Section 47B of the Competition Act 1998. France, in turn, allows collective follow-on actions after a decision of French or EU competition authorities. See Articles L. 423-1 and L. 423-17 of Law No. 2014-344 of March 17th, 2014 on consumer protection.

³⁶¹ See STUDY CENTRE FOR CONSUMER LAW – CENTRE FOR EUROPEAN ECONOMIC LAW, KATHOLIEKE UNIVERSITEIT LEUVEN, “An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings”, Final Report, A Study for the European Commission, Health and Consumer Protection Directorate-General, Directorate B –

Another important issue affecting the feasibility of bringing antitrust damages actions is whether passing-on defense is permitted. According to the Ashurst Study, the passing-on defense could constitute an obstacle for private actions, as it is likely to complicate claims and reduce the incentives for plaintiffs to bring actions.³⁶² This is so because the indirect purchaser must in general bear the burden of proof and demonstrate the causal relationship between the infringement and the damage that he has suffered as a result of the antitrust violation.³⁶³ If passing-on is permitted, indirect purchases and, especially consumers at the end of the distribution chain, will encounter large difficulties in proving the exact amount that has been passed on to them. Making it possible for indirect purchasers to bring a collective action together with other injured indirect purchasers could therefore serve to facilitate damages actions.

Other factors contributing to the comparatively low number of antitrust damages actions in the EU are believed to include the fact that the incentives for bringing antitrust damages are low since the outcome is often uncertain and the costs for bringing them are usually high.³⁶⁴ The damages awarded are also often modest since they traditionally aim only to compensate victims for the loss that they have suffered as a result of an antitrust violation.³⁶⁵ Given that the burden of proof in damages actions is high and the claimant must prove the violation of the antitrust rules and the causal relationship between that violation and the harm suffered, and must quantify his damages, bringing an antitrust damages action is a very complex task.³⁶⁶ The often limited access to evidence³⁶⁷ coupled with high litigation costs, the uncertainty in the outcome, and the potentially low damages award may therefore discourage potential claimants from even trying to bring damages claims. In addition, the very divergent national substantive and

Consumer Affairs, Leuven, January 17th, 2007, at p. 278. Hereinafter this study will be referred to as “Consumer Redress Study”.

³⁶² See Ashurst Study, at p. 6.

³⁶³ *Ibid.*, at p. 111.

³⁶⁴ Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 15.

³⁶⁵ *Ibid.*, at p. 35.

³⁶⁶ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 8.

³⁶⁷ See Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, 19.12.2005, at p. 5.

procedural rules contribute to the legal uncertainty and the differences have even increased since 2004.³⁶⁸

The obstacles referred to above only constitute examples of hurdles that victims of antitrust violations face when they wish to bring a damages action and seek compensation for the loss that they have suffered as a consequence of a violation. It should also be borne in mind that defendants face disadvantages. For example, they face the risk of being sued for damages in several Member States, or in the Member State where the substantive or procedural rules are most advantageous to the claimant.³⁶⁹ However, in light of the overall modest number of antitrust damages actions brought in the EU,³⁷⁰ it is clear that, under the current framework, private antitrust enforcement in the EU still leaves much to wish for. Therefore, in the following sections, the various obstacles to bringing antitrust damages actions in the EU will be examined by a study of the rules governing private enforcement in the United Kingdom, Germany, France, Spain, Sweden and Finland.

3.2. The UK

3.2.1. General Overview

In principle, it has been possible to award damages for infringements of the EU competition rules in the United Kingdom since the *Garden Cottage* case.³⁷¹ The cause of action for damages both for breach of EU competition law and the UK Competition Act 1998 is the tort of breach of statutory duty.³⁷² Since the entry into force of the Enterprise Act 2002, the Competition Appeal Tribunal (“CAT”) has been able to award damages throughout the United Kingdom following infringement decisions by the European Commission and/or the Office of Fair Trading (“OFT”) and now its successor the Competition and Markets Authority (“CMA”).³⁷³ In other words, only follow-on

³⁶⁸ Impact Assessment Report on the Draft Directive, at p. 16-17.

³⁶⁹ *Ibid.*, at p. 17.

³⁷⁰ See External Impact Study, at p. 28.

³⁷¹ *Garden Cottage Foods Ltd. Respondents v. Milk Marketing Board Appellants* [1984] A.C. 130.

³⁷² See Ashurst Study, at p. 4-6.

³⁷³ Section 47A of the Competition Act 1998. UK competition law applies uniformly throughout the United Kingdom, but Scotland and Northern Ireland have their own legal systems. See National Report on the UK prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 2.

actions for damages have been possible so far. However, the CAT does not have an exclusive jurisdiction over antitrust damages claims, but the claimant can go to civil courts. Stand-alone actions must be brought before the High Court.³⁷⁴

The CAT was bound by final decisions of the OFT finding an infringement when a damages claim was brought before it,³⁷⁵ although it was not always easy to determine the scope of that binding effect.³⁷⁶ In fact, the CAT does not have jurisdiction to establish liability as this is established by the competition authority (or other sectorial regulators), but it can only decide on causation and the amount of damages to be awarded. The infringement decisions adopted by the OFT were also binding upon the ordinary civil courts once the time for appeal had lapsed or the appeal had been unsuccessful.³⁷⁷ The same binding effect now applies to final decisions of the CMA. Following the ECJ judgment in *Masterfoods*, the Commission's infringement decisions are also binding on ordinary courts.³⁷⁸

Currently two types of collective actions exist in England and Wales: representative actions brought on behalf of consumers and Group Litigation Orders that courts can use to group together similar actions raising the same issues.³⁷⁹ Section 47B of the Competition Act 1998 provides for representative follow-on actions brought on behalf of consumers before the CAT. The actions are limited to claims brought on behalf of named consumers who have consented to be bound by the outcome of the litigation, and can only be brought by specified bodies that meet the criteria laid down by the Secretary

³⁷⁴ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 3.

³⁷⁵ Section 47A(9) of the Competition Act 1998.

³⁷⁶ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 4-5.

³⁷⁷ See National Report on the UK prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 4.

³⁷⁸ In *Masterfoods* the ECJ held that the obligation of national courts not to take conflicting decisions on agreements or practices, which may subsequently be the subject of a decision by the Commission, is even more important when national courts rule on competition matters that are already subject of a Commission Decision. See Judgment in *Masterfoods*, C-344/98, EU:C:2000:689, paragraph 52.

³⁷⁹ It should be noted that the UK government has decided to extend the representative actions as will be discussed below.

of State.³⁸⁰ So far, Which? (i.e. the former Consumers' Association) is the only specified body that may bring a consumer claim in the CAT.³⁸¹

The consumers, on behalf of which the action is brought, must be affected by an infringement of Article 101 or 102 TFEU or their UK equivalents, i.e. Chapters I and II of the Competition Act 1998. Moreover, the OFT or the Commission must have found that an infringement has taken place. All claims must relate to the same antitrust violation and relate to goods and services which the claimant received otherwise than in the course of business.³⁸² In case individual consumers have brought individual claims, a specified body can take over these claims and they can thus be dealt with together. In the event that the CAT awards damages they must be paid directly to the represented consumers individually. However, the CAT may order the damages to be paid to the specific body, if all the individuals and the specified body agree on this.³⁸³

In England and Wales, the courts can also use Group Litigation Orders to group together similar actions that raise the same issues.³⁸⁴ A Group Litigation Order must contain directions about the establishment of a group register on which the claims managed under the Group Litigation Order will be entered.³⁸⁵ It must also specify the issues, which will identify the claims to be managed as a group made under the Group Litigation Order, and specify the court which will manage the claims on the group register.³⁸⁶

³⁸⁰ These criteria are the following: “1. *The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity*; 2. *The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific consumers*. 3. *The body has capability to take forward a claim on behalf of consumers*. 4. *The fact that a body has a trading arm will not disqualify it from bringing consumer group claims, provided that the trading arm does not control the body, and any profits of the trading body are only used to further the stated objectives of that body*”. See United Kingdom – National Report, November 15th, 2006, prepared for the Consumer Redress Study, at p. 13. Hereinafter this report will be referred to as “United Kingdom – National Report”.

³⁸¹ See OFFICE OF FAIR TRADING, “Response to the European Commission’s Green Paper, Damages actions for breach of the EC antitrust rules”, OFT844, May 2006, at p. 13-14.

³⁸² See United Kingdom – National Report, at p. 13.

³⁸³ *Ibid.*, at p. 3.

³⁸⁴ See OFFICE OF FAIR TRADING, “Private actions in competition law: effective redress for consumers and business”, Discussion Paper, OFT916, April 2007, at p. 18.

³⁸⁵ Civil Procedure Rules 19.11(1).

³⁸⁶ Civil Procedure Rules 19.11(2).

Liability is established for the main part of the case that affects the whole group. The group is then split into different groups sharing similar damages claims and the claims of each group are considered by the court, which assesses individual damages.³⁸⁷ A judgment given in a claim on the group register in relation to a Group Litigation Order issue is binding on the parties to all other claims that are on the group register at the time the judgment is given or the order is made, unless the court orders otherwise. Claims that are subsequently entered on the group register are binding on the parties to the extent to which the court has given directions.³⁸⁸ But the Group Litigation Order is only an alternative to bringing an action, and it does not impede harmed consumers from bringing an individual action.³⁸⁹

A Group Litigation Order is very flexible, but it leaves considerable discretion with the judge. The judge can decide which aspects of a case should be treated as Group Litigation issues and which ones as individual matters. Consequently, it is difficult for the parties to predict to which extent a judge will make use of a Group Litigation Order. Moreover, the court determines which costs are individual and which are common costs under the Group Litigation Order. The party is liable for its individual costs and is severally liable for its portion of the common costs.³⁹⁰

As these forms of collective actions and the available redress for victims of antitrust violations are not sufficiently efficient, the OFT published recommendations on ways of enhancing redress for individuals harmed by breaches of competition law, as it considered that the redress system left room for improvement. The OFT recommended that representative actions for damages should be possible for consumers as well as businesses, both as stand-alone and follow-on actions, because they face obstacles to private redress. Since the resources of competition authorities are limited, consumers are in certain cases obligated to pursue the cases alone, but they often lack resources or

³⁸⁷ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 18.

³⁸⁸ Civil Procedure Rules 19.12(1).

³⁸⁹ See MIEGE, C., “*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*”, in the Workshop “*Remedies and Sanctions in Competition Policy*”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 16.

³⁹⁰ See United Kingdom – National Report, at p. 11-12.

skills to do so and are, consequently, disadvantaged vis-à-vis the infringing companies. Similarly, businesses may face significant barriers to bringing damages claims, and some kind of collective action would be needed to balance the economic harm caused by the infringers.³⁹¹ Therefore, meritorious cases may not be brought or may only be brought by a small number of the victims. If it were instead possible to bring representative actions on behalf of consumers or businesses at large, this would encourage a larger number of well-founded actions being brought.³⁹²

The OFT recommended that the judge should be able to decide whether given claims should be brought as representative action on behalf of consumers or businesses at large, or on behalf of named consumers or businesses, or as individual actions. This case-by-case assessment would, nevertheless, be made on the basis of appropriately defined criteria and filters.³⁹³

The UK government did not act on the recommendations of the OFT, but the BIS (Department for Business Innovation & Skills) published its consultation on options for reform of private enforcement in 2012.³⁹⁴ The UK Government then published its response to the consultation in January 2013,³⁹⁵ which aims to improve the private actions regime by making it easier for consumers and companies to seek redress from undertakings that have infringed competition law. In order to achieve this, the UK Government proposes in particular to make the CAT the main jurisdiction for damages claims, to introduce a limited form of opt-out collective actions, to promote alternative dispute settlement resolution, and ensure that private litigation actions complement public enforcement.³⁹⁶

³⁹¹ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Recommendations from the Office of Fair Trading, OFT916resp, November 2007, p. 15-19.

³⁹² *Ibid.*, at p. 23-27.

³⁹³ *Ibid.*, at p. 29.

³⁹⁴ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform*”, April 2012.

³⁹⁵ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013.

³⁹⁶ *Ibid.*, at p. 14-15.

Therefore, the UK Government has decided to introduce both stand-alone and follow-on collective actions, which may be brought before the CAT. Apart from stand-alone actions, collective actions could also be brought in order to request injunctive relief before the CAT so as to make it the main forum for competition litigation. Moreover, it will become possible to transfer competition law cases to the CAT and *vice versa*. The objective behind this reform is to take advantage of the expertise of CAT in competition litigation, and to facilitate bringing competition claims by reducing the opportunity for contesting jurisdiction. In this manner, the UK Government believes that both claimants and defendants are likely to benefit from efficient case management and the flexible procedures of the CAT.³⁹⁷

A fast-track mechanism will be introduced for simpler cases in the CAT. This model is mainly to be used by SMEs, although the CAT may also decide to apply this procedure in other cases. However, it will mainly focus on granting injunctive relief. It should be noted that all the cases using the fast-track must be cost-capped,³⁹⁸ so it will be possible to better manage the costs of the action.

As to the new collective action, it may be brought both for consumers or businesses or a combination of both. However, it should only be allowed if it is the best way of bringing a case. Moreover, collective actions may only be brought before the CAT. The CAT will have to certify the group and decide on whether the collective action should be brought as an opt-in or opt-out action.³⁹⁹ This certification process should include “*a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case*”.⁴⁰⁰ It is also important to bear in mind that the opt-out element of collective actions would only apply to claimants domiciled in the United Kingdom, whereas claimants in other jurisdictions could opt in if they wished. This limitation will be introduced in order to avoid that defendants would have to pay twice for the same harm to foreign defendants.⁴⁰¹

³⁹⁷ *Ibid.*, at p. 18.

³⁹⁸ *Ibid.*, at. 21-22.

³⁹⁹ *Ibid.*, at p. 31-32.

⁴⁰⁰ *Ibid.*, at p. 40.

⁴⁰¹ *Idem.*

Furthermore, collective actions could only be brought by claimants or “genuine representatives” of the group – i.e. trade associations or consumer organizations, whereas law firms, third party funders or special purpose vehicles would not qualify for bring such actions. This restriction is considered as necessary in order to avoid risk of abuse which could occur if such parties were allowed to bring a collective action only for the purpose of litigation.⁴⁰² Nevertheless, there are arguably other ways of reducing the risk of abuse, which would have less restrictive effect on the possibility of bringing collective antitrust damages actions.⁴⁰³ Other restrictions on future collective actions include the prohibition of exemplary damages and contingency fees. But conditional fee agreements (i.e. the lawyer can obtain a success fee in addition to the initial legal fee if the claim is successful), and “after the event insurance” will still be allowed even in collective actions.⁴⁰⁴ These restrictions are arguably likely to make the new collective action less efficient than desirable in that there will be less incentives to bring such actions, and funding might constitute an additional obstacle to bringing collective damages claims. If an opt-out collective action is settled, it will require judicial approval. The judge must also consider the reasonableness of the fees of legal representatives, and claimants must be given an opportunity to opt-out of the settlement.⁴⁰⁵

In addition, the UK Government will also introduce an opt-out collective settlement system for competition law in the CAT, which is modelled after the Dutch Mass Settlement Act.⁴⁰⁶ Under this system, the defendant and a representative of injured parties (or multiple representatives of different categories of claimants) could jointly apply to the CAT for approval of their opt-out settlement agreement. This type of settlement would only apply to claimants domiciled in the UK, but claimants in other jurisdiction would be able to opt in if they wished to join the settlement. The case would have to be certified as suitable by the CAT. The requirements would be similar as the

⁴⁰² *Ibid.*, at p. 34.

⁴⁰³ See Section 7.4.

⁴⁰⁴ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 40-41.

⁴⁰⁵ *Ibid.*, at p. 43.

⁴⁰⁶ *Ibid.*, at p. 32.

certification of a collective action, although the parties would not have to demonstrate the superiority of the action. There would also not be any merits test since the settlement would be consensual. Also, the settlement itself would require the approval of CAT in order to ensure that it is “*fair, just and reasonable*”.⁴⁰⁷

As to damages, the UK Government (contrary to what is provided by the new Directive on Antitrust Damages Actions) has decided not to introduce a rebuttable presumption of loss for cartel cases, since it would depart from one of the basic principles of English law. It considers that in many cases substantial economic evidence would still be needed since the defendant would try to rebut the presumption, and such a presumption could be difficult to operate in cases involving purchasers at different levels in the distribution chain. Similarly, the UK Government has also decided not to address the passing-on defense in legislation, but considers that its application would be better addressed through case law.⁴⁰⁸ Any unclaimed damages must, in principle, be paid to the Access to Justice Foundation. However, in order to give the defendants an incentive to settle, an exception could be made for the benefit of the defendants or a *cy-près*, provided that that other basis is approved by the CAT.⁴⁰⁹

Finally, limitation periods for the CAT will be the same as those of the High Court. This means that in all private action cases brought in England and Wales and Northern Ireland, the action has to be brought within six years from the date on which the cause of action accrued.⁴¹⁰ This would improve the situation of claimants before the CAT where the claim must currently be brought within two years of, depending on which is the later, the date of the final infringement decision (establishing a breach of the UK or EU antitrust rules) or the date on which the cause of action accrued.⁴¹¹ There is also a special limitation period for those cases where the claimant did not have full knowledge of the facts related to the tort. In these cases, the limitation period will start to run from the date when the claimant has acquired sufficient knowledge about the facts in order to

⁴⁰⁷ *Ibid.*, at p. 50.

⁴⁰⁸ *Ibid.*, at p. 25.

⁴⁰⁹ *Ibid.*, at p. 42.

⁴¹⁰ In Scotland the applicable limitation period of five years will not be subject to any modification. See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 18.

⁴¹¹ Section 47A(7) and 47A(8) of the Competition Act 1998.

bring a claim.⁴¹² But even in these cases, the limitation period will end 15 years from the actual date of the tort.⁴¹³

The most important case of private enforcement is undoubtedly *Bernard Crehan v. Inntrepeneur Pub Company, Brewman Group Ltd*,⁴¹⁴ since in that case a preliminary reference was made to the Court of Justice in which the ECJ confirmed that a Union right to damages exists for harm suffered as a result of a breach of Article 101 TFEU. The damages action was brought by Mr. Crehan who had acquired the lease on two pubs which Inntrepeneur Pub Company owned. Under the leases, Crehan was obligated to purchase beer from Courage during 20 years (i.e. the duration of the lease). As Crehan's business was unsuccessful, he was forced to surrender the leases to Inntrepeneur Pub Company to whom he still owed arrears of rent. In addition, he had not paid for all the beer and goods that he had purchased from Courage and, therefore, Courage initiated proceedings against him in order to recover the debts. Crehan claimed that the leases and the beer ties breached Article 101 TFEU, and sought damages for the loss that this infringement had caused him. He argued that his competitors, i.e. nearby untied pubs, could purchase beer at significant discounts, and sell it at a much lower price than he could because of the beer tie that obligated him to buy all the beer from Courage. But the Chancery Division of the High Court held that the beer supply market had not been foreclosed to would-be entrants to the extent that it would constitute an infringement of Article 101 TFEU, and dismissed the damages claim.

Crehan appealed the decision and the Court of Appeal awarded damages for the first time in the United Kingdom for breach of Article 101 TFEU.⁴¹⁵ According to the Court, the beer ties infringed Article 101 TFEU, since they had significantly contributed to the foreclosure of the market and had therefore caused the failure of Crehan's business. Consequently, Crehan was entitled to provisional damages of £131,336 plus interest.⁴¹⁶ However, in June 2006, the House of Lords overturned the ruling by the Court of

⁴¹² Section 11(4)(b) of the Limitation Act 1980.

⁴¹³ Section 14B of the Limitation Act 1980.

⁴¹⁴ *Bernard Crehan v. Inntrepeneur Pub Company, Brewman Group Ltd* [2003] EWHC 1510 (Ch).

⁴¹⁵ National Report on the UK prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 1.

⁴¹⁶ *Bernhard Crehan v Inntrepeneur Pub Company, Brewman Group* [2004] EWCA Civ 637.

Appeal holding that the High Court had properly assessed all the evidence and reached the appropriate conclusion.⁴¹⁷ It should be noted that the House of Lords focused its ruling on the duty of sincere co-operation, which all national courts must comply with, and concluded that if there was no “real conflict” between a Commission Decision and a judgment by a national court, the national court would not be bound by the Commission Decision, but could take the Commission Decision into account to the extent that this was supported by evidence.⁴¹⁸ It is possible that the House of Lords chose to focus its analysis on other aspects than the damages claim itself in order to find a justification not to grant damages to a party to an anti-competitive agreement since this would be contrary to English law, which does not allow a party to an illegal agreement to claim damages from the other party.

Another antitrust damages case of interest is *Provimi*,⁴¹⁹ which was a follow-on action brought by two English undertakings and a German undertaking, after the European Commission had found that various manufacturers of vitamins belonging to the Hoffman-La Roche and Aventis groups had breached Article 101 TFEU by participating in cartels in relation to the sale of vitamins within the EU and the EEA.⁴²⁰ The claimants were direct purchasers of vitamins from undertakings within the Hoffman-La Roche and Aventis groups. The UK Commercial Court held that it had jurisdiction over foreign defendants domiciled outside the United Kingdom that were subsidiaries to the companies which had infringed the competition rules because they had implemented the anti-competitive agreement.⁴²¹ Nevertheless, the case was settled before the court ruled on the substantive issues of the case.⁴²² It has been suggested that

⁴¹⁷ *Crehan v. Intreprenuer Pub Co (CPC) and another* (Office of Fair Trading and others intervening) [2006] 3 W.L.R. 148.

⁴¹⁸ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 19.

⁴¹⁹ *Provimi Limited v. Aventis Animal Nutrition SA* [2003] E.C.C. 29.

⁴²⁰ Case COMP/E-1/37.512 – Vitamins, Commission Decision of November 21st, 2001.

⁴²¹ The Court held that when companies belong to the same undertaking [within the meaning of undertaking under EU competition law] and one of those companies had together with other independent undertakings infringed Article 101 TFEU, all the other companies within the undertaking which had breached the competition rules had also infringed the competition rules, if they had implemented the anti-competitive agreement. Consequently, claimants were entitled to seek damages from these companies for loss caused by the anti-competitive agreement. See *Provimi Limited v. Aventis Animal Nutrition SA* [2003] E.C.C. 29.

⁴²² See MIEGE, C., “*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*”, in the

this judgment could encourage claimants from other jurisdictions to bring antitrust damages claims in the United Kingdom, because of the possibility of discovery, exemplary damages and group litigation in the United Kingdom.⁴²³ In fact, the UK is one of the EU Member States with most antitrust damages actions.⁴²⁴

In March 2007, the consumers' association Which? brought a claim for damages on behalf of approximately 130 individual consumers against JJB Sports plc. This was the first (and so far only) case of representative action in an antitrust case in the United Kingdom. The consumers had purchased replica Manchester United football shirts at their launches for the 2000/2001 and 2001/2002 seasons, or replica England shirts in the month before and at the time of the Euro 2000 tournament. The action arose as a result of the findings made by the OFT and the CAT in respect to three price-fixing arrangements involving JJB Sports plc in the sale of replica football kit in 2000 and 2001. The claimant sought compensatory damages for each shirt bought by a consumer from a participant in one of the three infringements during the period of the infringement found by the OFT and the CAT, as well as exemplary or restitutionary damages to the sum of 25% of the relevant turnover of JJB Sports net of VAT, or such other sum found appropriate by the CAT.⁴²⁵

However, in January 2008, JJB Sports plc settled the case with Which?.⁴²⁶ Fans who had paid up to £39.99 for the football shirts and joined the case against JJB Sports received a payment of £20 each, while other customers who were not part of the case were able to claim back £10.⁴²⁷ It should be noted that due to the difficult task of

Workshop “*Remedies and Sanctions in Competition Policy*”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 29.

⁴²³ See BULST, F.W., “The Provimi Decision of the High Court: Beginnings of Private Antitrust Litigation in Europe, *European Business Organization Law Review*, Vol. 4, Iss. 4, 2004, p. 623-650, at p. 650.

⁴²⁴ See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 19.

⁴²⁵ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07.

⁴²⁶ See “JJB Sports PLC - Agreement With Which?”, Reuters, Jan 9th, 2008, available at <http://www.reuters.com/article/pressRelease/idUS114080+09-Jan-2008+RNS20080109>.

⁴²⁷ See HODGE, N., “EC acts on antitrust breaches”, *Financial Director*, June 2008, at p. 42.

defining the customers, whether injured parties could profit from the action generally depended on their willingness to claim compensation during the settlement period.⁴²⁸

This case demonstrates the shortcomings of opt-in representative actions. As one commentator has observed, it forced Which? to attract individual consumers to opt in by launching a media campaign. But only comparatively few consumers signed up although Which? had estimated that approximately 2 million consumers were victims of the cartel. Another reason why the final compensation of each consumer varied was that not all claimants could adduce proof of purchase. In addition, access to evidence from OFT and JJB Sports plc proved burdensome and expensive.⁴²⁹

Another attempt to bring a representative claim has also failed. The representative claim was brought by Emerald Supplies Ltd under r.19.6 of the Civil Procedure Rules⁴³⁰ against British Airways. The undertaking sought damages for losses that it and other direct and indirect purchasers of air freight services had suffered from agreements and concerted practices between British Airways and certain other international airlines breaching Article 101(1) TFEU, Article 53 EEA and Section 2 of the UK Competition Act 1998. Because of the antitrust violation, the prices of air freight services had been inflated.⁴³¹ But the claim was struck down by the High Court since a representative action could only be brought under r.19.6 if the claimants held the same interest at the time when the claim was initiated.⁴³² The harm suffered had also to be common and the remedy sought had to be beneficial to all claimants. In this case, the Court deemed that the remedy sought would not equally benefit all the claimants since they were situated at different levels in the chain of distribution, but there would be conflicts between the claims of the different members of the class. This was due to the fact that the class was described as “*direct or indirect purchasers of air freight services the prices of which were inflated by the arrangements or concerted practices*”, and therefore the criteria for

⁴²⁸ See MULHERON, R., “The case for an opt-out class action for European Member States: a legal and empirical analysis”, *Colum. J. Eur. Law*, 15, Summer, 2009, p. 409-453, at p. 439.

⁴²⁹ See HODGES, C., *The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 25.

⁴³⁰ Under this provision, a representative action can be brought on behalf of parties who have the same interest in the claim.

⁴³¹ *Emerald Supplies Ltd v. British Airways Plc* [2009] C.P. Rep. 32.

⁴³² *Ibid.*, at § 31.

including claimants in the class depended on the outcome of the action. As a result, it was not possible to determine the members of the class at the time when the claim was issued.⁴³³ The Court of Appeal upheld this ruling.⁴³⁴

The ruling in *Devenish Nutrition Ltd v. Sanofi-Aventis SA*⁴³⁵ on preliminary issues has, in turn, clarified the remedies available in English law for breaches of Article 101 TFEU.⁴³⁶ The claimants, who were vitamin premix and food processing companies, brought an action for damages against companies within the Hoffmann LaRoche, BASF and Aventis groups relating to vitamins cartels, which the latter had operated in the 1990s. The preliminary issues concerned the claimants' possible right to exemplary damages, restitutionary damages, and an account of the profits. The judge rejected all these claims.

Exemplary damages were not available because the Commission had already imposed fines on the companies participating in the cartels, and the objective of the fines was to punish the defendants, and to deter them from participating in cartels, i.e. the objective of the Commission Decision was the same as that of exemplary damages. Awarding exemplary damages would also have been contrary to the *non bis in idem* principle, and could be interpreted as a decision running counter to the Commission Decision, since it would implicitly have meant that the national court had found the fines imposed by the Commission to be insufficient.⁴³⁷

The judge also held that restitutionary damages are not available in antitrust cases, and can only be awarded when compensatory damages are not available. Similarly, the judge stated that an account of profits is only available in exceptional circumstances, and could not be awarded in this case because compensatory damages were available.⁴³⁸

⁴³³ *Ibid.*, at § 33-36.

⁴³⁴ *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284.

⁴³⁵ *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWCH 2394 (Ch).

⁴³⁶ See SINGLA, T., "The remedies (not) available for breaches of Article 81 EC", *E.C.L.R.*, Volume 29, Issue 3, 2008, p. 201-205, at p. 205.

⁴³⁷ Article 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1*, 4.1.2003, p. 1-25 and Judgment in *Masterfoods*, EU:C:2000:689, paragraph 52.

⁴³⁸ *Devenish Nutrition Ltd v. Sanofi-Aventis SA* [2007] EWCH 2394 (Ch).

Following the ruling, it appears that under English law only compensatory damages can be awarded for infringements of the EU competition rules,⁴³⁹ and possibly exemplary damages can be awarded if no Commission Decision exists.

This ruling should be contrasted with *2 Travel Group PLC (in Liquidation) v. Cardiff City Transport Services Ltd*, in which the CAT awarded £60,000 as exemplary damages in addition to a damages award in lost profit.⁴⁴⁰ This case is also significant because it is the first case in which a final award of damages before the CAT has been successful.⁴⁴¹

Access to evidence and the conciliation of public and private enforcement has also been the subject of a ruling. In *National Grid*, the claimant requested the disclosure from the defendant of the confidential version of the relevant Commission Decision, some responses to the Commission's statement of objections as well as some requests for information by the Commission. The defendants had been fined by the Commission for participating in the *Gas Insulated Switchgear Cartel*. The judge made a case-by-case analysis of whether proportionality and procedural fairness required the documents to be disclosed, which is in line with the balancing test established in *Pfleiderer*. He considered in particular that the request was not for the leniency statements as such, but statements from them included in the documents sought by the claimant. Also, it would be difficult for the claimant to access the information from other sources, and the documents were relevant for the claim. As a result, access was granted to some of the information contained in the documents requested.⁴⁴² As will be demonstrated later, the rules concerning disclosure are more generous in the United Kingdom than in many civil law jurisdictions, which made it easier for the judge to assess individually the pieces of information contained in the relevant documents.⁴⁴³

⁴³⁹ See MCDOUGALL, A., "Vitamins litigation: unavailability of exemplary damages, restitutionary damages and account of profits in private competition law claims", *E.C.L.R.*, Volume 29, Issue 3, 2008, p. 181-184, at p. 184.

⁴⁴⁰ *2 Travel Group PLC (in Liquidation) v. Cardiff City Transport Services Ltd* [2012] CAT 19.

⁴⁴¹ See RODGER, B.J., AHRC Project, "Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report", at p. 8.

⁴⁴² *National Grid* [2012] EWHC 869. However, it should be noted that the documents in question only quoted from the corporate statements and were not themselves corporate statements.

⁴⁴³ See GUTTUSO, L., "The enduring question of access to leniency materials in private proceedings: one draft Directive and several court rulings", *G.C.L.R.*, 2014, 7(1), p. 10-22, at p. 19.

Although (with the exception of the past few years) there have been comparatively few antitrust damages actions before the courts in the UK,⁴⁴⁴ the number of antitrust cases is believed to be much higher. In fact, a majority of antitrust disputes are settled out of court before a final judgment is given.⁴⁴⁵ Research conducted by Professor Barry J. Rodger suggests that during the period 2000-2005 at least 43 competition cases were settled.⁴⁴⁶ The reasons for settling the case were most frequently evidential difficulties or, particularly in cases involving abuse of dominance, uncertainty in the outcome of the litigation.⁴⁴⁷ This tendency seems to continue, but it should also be noted that there has been a significant increase in damages claims in the past few years. For instance, during the period between 2009 and 2012 over 30 antitrust damages claims were brought, although it is believed that a significant part of such claims are still settled out of court.⁴⁴⁸

In particular, more antitrust damages actions have been brought before the High Court.⁴⁴⁹ The reason why the High Court seems to have been preferred over the CAT by claimants includes the possibility of bringing a claim before the High Court before the infringement decision on which the claim is based becomes final. This is particularly important if there is a risk for a so-called “torpedo action” by the defendant, where the defendant would try to raise a negative declaratory action in an alternative jurisdiction. By contrast, a follow-on action for damages can only be brought before the CAT once the appeal procedure has been completed.⁴⁵⁰

⁴⁴⁴ Until 2005, only 15 final judgments in antitrust damages cases have been given in the UK. See RODGER, B.J., “Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005”, *E.C.L.R.*, Volume 29, Issue 2, 2008, p. 96-116, at p. 115.

⁴⁴⁵ *Ibid.*, at p. 97 and Joint Working Party of the Bars and Law Societies of the United Kingdom (“JWP”), Response to the Commissions Green Paper “Damages actions for breach of the EC antitrust rules”, May 2006, at p. 2.

⁴⁴⁶ See RODGER, B.J., “Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005”, *E.C.L.R.*, Volume 29, Issue 2, 2008, p. 96-116, at p. 100. The actual number is, however, expected to be much higher since the response rate of the questionnaires on antitrust settlements sent to law firms involved in antitrust litigation was approximately 39%. See *op. cit.* at p. 99.

⁴⁴⁷ *Ibid.*, at p. 112.

⁴⁴⁸ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 42.

⁴⁴⁹ *Ibid.*, at p. 4.

⁴⁵⁰ *Ibid.*, at p. 24.

Of private litigation actions, claims for damages have generally been the most successful type of actions, but they have, until recently, only resulted in interim damages being awarded. The first final, successful, damages award was only granted in 2012 by the CAT,⁴⁵¹ and it was followed in 2013 by *Albion Water v. Dwr Cymru Cyfyngedig*.⁴⁵²

3.2.2. Main Obstacles to Private Enforcement

As regards the main obstacles to private enforcement, the OFT highlighted legal costs and uncertainty in the outcome of the litigation as potential obstacles to private antitrust actions brought by consumers as well as undertakings. Other obstacles include evidential barriers in bringing competition cases and the burden of proof.⁴⁵³ A further disincentive for bringing antitrust damages actions is the lengthy proceedings due to the unsatisfactory knowledge of lawyers and the judiciary, and the fact that competition law and judicial remedies in private enforcement are novel.⁴⁵⁴

Analyzing these obstacles in more detail, the disclosure obligation under the Civil Procedure Rules is fairly extensive as parties must disclose all documents which are relevant to the litigation, regardless of whether they support or harm their own case.⁴⁵⁵ But the parties will not have access to all kinds of evidence, since access to leniency materials may be limited. However, it is a positive sign that, in light of the *National Grid* ruling, the issue of access to such material will be decided on a case-by-case basis, taking into consideration *inter alia* the difficulty of the claimant obtaining access to that material from other sources, and its relevance for bringing the claim.

As to the costs of antitrust damages actions, they partly depend on the court before which they are brought. The “loser pays” rule applies in the High Court, although the court may decide to deviate from it by considering all the circumstances of the case.⁴⁵⁶

⁴⁵¹ *2 Travel Group PLC (in Liquidation) v. Cardiff City Transport Services Ltd* [2012] CAT 19.

⁴⁵² *Albion Water v. Dwr Cymru Cyfyngedig* [2013] CAT 6.

⁴⁵³ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 8-10.

⁴⁵⁴ See National Report on the UK prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 34.

⁴⁵⁵ Civil Procedure Rules Part 31.

⁴⁵⁶ Civil Procedure Rules 44.3.

The costs will depend, *inter alia*, on the amount involved, the importance of the matter to all the parties, the complexity of the matter or the difficulty or novelty of the questions raised, as well as the skill, effort, specialized knowledge and responsibility involved.⁴⁵⁷ By contrast, the “loser pays” principle does not apply in the CAT, but the parties may be ordered to pay their own costs. Exceptionally the claimant may be ordered to pay any costs incurred by the defendant (with interests) if the defendant has made an offer to settle which the claimant has failed to better following a substantive hearing. However, the CAT will not order the payment if it considers it unjust.⁴⁵⁸ Because of this rule, the defendant will have a strong incentive to offer a settlement since there is a possibility that the claimant will pay for the costs incurred by him.⁴⁵⁹

Moreover, it has to be noted that lawyers’ fees are very high in the United Kingdom,⁴⁶⁰ which may discourage claimants from bringing antitrust damages actions, even if they are well-founded, if the outcome is uncertain because of the complexity of the case. In order to reduce the legal risks, a claimant may enter into a conditional fee agreement, according to which its lawyer can obtain a possible success fee in addition to the initial legal fee. If the claim fails, the lawyer must pay both sides’ costs.⁴⁶¹ The risk therefore shifts to the lawyer, provided that the lawyer is willing to bring the action.⁴⁶²

The claimant may also insure against the costs of the other party by using an “After the Event Insurance” thanks to which it does not incur the risk of paying those cost if its claim fails. Although the insurance premium must be paid in advance, it can be recovered if the claim succeeds. However, as the outcome of many antitrust damages actions is uncertain, insurers are likely to charge a premium that would be too high to make taking an insurance pay off. In addition, conditional fee arrangements have not

⁴⁵⁷ Civil Procedure Rules 44.5.

⁴⁵⁸ CAT Rules 43.7.

⁴⁵⁹ See PEYSNER, J., “Costs and Financing in Private Third Party Competition Damages Actions”, *CompLRev*, Volume 3, Issue 1, December 2006, p. 97-115, at p. 109.

⁴⁶⁰ *Ibid.*, at p. 98.

⁴⁶¹ See External Impact Study, at p. 208.

⁴⁶² See LESKINEN, C. “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121.

been commonly used in antitrust damages actions, which seems to be due to the complexity and unpredictability of these actions.⁴⁶³

In order to give an incentive to lawyers to bring well-founded actions, the OFT also proposed that in conditional fee arrangements it should be possible to increase the percentage more than 100%, particularly in complex or novel competition cases. However, it argued that the funding arrangement should be subject to judicial supervision. Furthermore, it recommended allowing the courts discretion to cap parties' costs liabilities in competition cases in order to encourage well-founded actions. In certain cases and, in particular, in representative actions, it could even be appropriate to cap the claimant's liability for the defendant's costs at zero.⁴⁶⁴ The OFT recommended that courts be given discretion to cap parties' costs liabilities in antitrust cases since it would provide claimants with certainty as to their potential exposure if they lost their case. In addition, costs-capping can reduce incentives to run up costs with the result that parties are encouraged to conduct litigation efficiently.⁴⁶⁵ To certain extent, these recommendations have been followed-up by the adoption of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which allows so-called damages-based agreements, i.e. contingency fees, in civil cases. But the UK Government has decided to preserve the "loser pays" rule, and contingency fees will not be available to opt-out collective actions in the CAT. In addition, it considered the existing possibility of capping costs and damages before the CAT as sufficient in order to exceptionally depart from the "loser pays" rule.⁴⁶⁶

More flexibility as to the way in which antitrust damages actions can be funded is a positive development, but it would seem that the reforms to be introduced in the UK

⁴⁶³ See PEYSNER, J., "Costs and Financing in Private Third Party Competition Damages Actions", *CompLRev*, Volume 3, Issue 1, December 2006, p. 97-115, at p. 99-100.

⁴⁶⁴ See OFFICE OF FAIR TRADING, "*Private actions in competition law: effective redress for consumers and business*", Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 32-34. Other recommendations included requiring the UK courts to have regard to OFT's decision and guidance and to establish a merits-based litigation fund. The Secretary of State should also be conferred the power to exclude leniency documents from use in litigation without the consent of the leniency applicant, and to remove joint and several liability for immunity recipients in private antitrust actions so that they would only be liable for the harm they caused. See p. 3 of the recommendations.

⁴⁶⁵ *Ibid.*, at p. 32-34.

⁴⁶⁶ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, "*Private actions in competition law: a consultation for options on reform – government response*", January 2013, at p. 41.

will not be sufficient. In particular, this will be the case for consumers whose individual losses may be too small to merit the bringing of an action. Therefore, the envisaged reform of the collective action by providing for the possibility of opt-out collective actions in certain cases is very welcome. As have been seen above, the current representative action for bringing competition claims has only been used once, and in the end that action was also settled.⁴⁶⁷ It is logical to presume that representative actions exclusively on behalf of named consumers fail to optimize economies of scale, and result in unnecessary costs and complexity, which in turn have the implication that meritorious cases might not be brought, or might only be brought by a small number of the victims.⁴⁶⁸

The existing alternative to a representative action, the Group Litigation Order, has even more drawbacks. For instance, consumers must individually issue claims before common issues can be assessed, and individual claimants must also often share the costs of a test case, and pay the costs of the defendant if the case is unsuccessful. In addition, there is not the possibility of optimizing economies of scale by bundling the claims together in an action brought by the representative body. Group Litigation Orders therefore increase the costs and are more time-consuming than representative actions,⁴⁶⁹ again not making the Group Litigation Order an optimal remedy for consumers who have been victims of an antitrust violation.

The new collective action, which makes it possible to bring an opt-out collective action on behalf of consumers (and in justified cases also on behalf of undertakings) should enhance access to justice of injured parties as the group of claimants will be more likely to be sufficiently large at least in mass harm situations for the action to pay off. However, whether the action will actually serve to enhance redress of injured parties will ultimately depend on sufficient funding. The limitations of the envisaged collective action, which are said to act as safeguards against unmeritorious actions, might in fact undermine the efficiency of the action. Prohibiting contingency fees in opt-out

⁴⁶⁷ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07.

⁴⁶⁸ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 23.

⁴⁶⁹ *Ibid.*, at p. 16-17.

collective actions clearly limits the possibilities of having access to sufficient funding. Similarly, the prohibition of bringing collective actions by third-party funders has the same effect.

Coupled with the requirement that the action may only be brought by a “genuine representative” of the victims, there is a risk that some meritorious actions may not be brought if the organization in question is not willing to bring the action, for instance, because the outcome of the action is uncertain and there is a risk of incurring high costs. Arguably, the case-by-case assessment by the court in order to certify the group and decide on whether the collective action should be brought as an opt-in or opt-out action⁴⁷⁰ should be sufficient in order to exclude those actions in which there might be some abuse, and there is no need to exclude actions brought by law firms of third-party funders. In addition, the fact that no treble or exemplary damages in collective actions will be available⁴⁷¹ reduces the incentives to bring an action if the amount of damages to be awarded is low.

Overall, however, the reform of private enforcement presents some welcome improvements which could be expected to increase antitrust damages claims (and other types of private litigation actions). One of the main changes includes the possibility of also bringing stand-alone actions before the CAT. This is particularly important in those cases where there would otherwise exist a risk that the defendant brings a so-called torpedo action before the decision of the competition authority has become final and the claimant is finally allowed to bring a follow-on action before the CAT.⁴⁷² Moreover, making the CAT the main forum for antitrust damages action would also serve to increase the expertise of the court in deciding such actions, and would thus reduce the problem of the judiciary not always having a satisfactory knowledge of the relevant competition law issues. The length of the proceedings would also be reduced in that an infringement decision would not be required. Nevertheless, in cartel cases, follow-on

⁴⁷⁰ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 31-32.

⁴⁷¹ *Ibid.*, at p. 40-41.

⁴⁷² Unless permission is granted to the claimant to bring the action before the infringement decision has become final.

actions would still remain the only realistic redress possibility since proving the existence of a cartel is practically impossible without extensive pre-trial discovery.

Finally, the decision to introduce an opt-out collective settlement system for competition law in the CAT could give incentives to claimants to settle claims quickly in order not to receive bad goodwill in cases involving numerous claimants, and to avoid the risks and costs of litigating the case in court. But settlement mechanisms will only be an effective remedy in case there is an effective judicial remedy available for the claimants if the defendant were to try to abuse its position as the stronger party (which would usually be the case in settlements involving damages claims by consumers or SMEs) so as to dictate settlement terms beneficial to it. Although the court will have to approve the settlement, injured parties might still be willing to accept a settlement offer significantly below the level they could get in court, provided that the collective action remedy is efficient. It should be recalled that the funding of these actions might be compromised in the model envisaged by the UK Government.

3.3. Germany

3.3.1. General Overview

Already when the German Act against Restraints of Competition⁴⁷³ was drafted in 1955 the idea was to give an important role to private parties in the enforcement of competition law as “private attorney generals”.⁴⁷⁴ Contrary to the situation in most Member States, private actions have therefore been common in Germany. The conclusion made in the Ashurst Study, according to which private enforcement is underdeveloped in the EU,⁴⁷⁵ is hence not correct regarding the situation in Germany. However, private enforcement has not played a significant role with regard to victims of hardcore cartels in Germany.⁴⁷⁶ This is, for instance, due to the judiciary’s hesitation to

⁴⁷³ *Gesetz gegen Wettbewerbsbeschränkungen*.

⁴⁷⁴ See MIEGE, C., “Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB”, in the Workshop “Remedies and Sanctions in Competition Policy”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 18.

⁴⁷⁵ See Ashurst Study, at p. 1.

⁴⁷⁶ Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission “Damages actions for breach of the EC antitrust rules”, at p. 1. However, there is an increasing awareness among undertakings of follow-on damages claims against

give standing or to award damages to private parties. In addition, the Act against Restraints of Competition of 1955 only conferred the right to bring an antitrust damages action, if a provision of the Act having a protective purpose had been infringed. The courts were thus required to analyze in each individual case whether it had been the intention of the legislator to protect the claimant in question, and this resulted in confusing case-law making it fairly unpredictable whether a provision was regarded as protective or not.⁴⁷⁷

As regards cartel cases, an infringement of competition rules was only found to exist if the cartel members aimed at harming or eliminating a specific customer group on the market, i.e. mainly in boycott cases. In addition, the dominating opinion was that hardcore cartels were sanctioned heavily and efficiently as administrative offences by the German Competition Authority and, therefore, private enforcement was not needed in this area.⁴⁷⁸

Furthermore, Section 33 of the Act against Restraints of Competition was inapplicable to breaches of Articles 101 and 102 TFEU. Instead, these claims were based on Section 823(2) of the German Civil Code, which also required a protective character of the norm that had been infringed in order to give rise to an obligation to compensate the damage caused intentionally or negligently. The Supreme Federal Court generally acknowledged that Articles 101 and 102 TFEU fulfilled this protective character criterion, but only with respect to competition restrictions directed against actors on the other side of the market, i.e. direct purchasers. These difficulties together with the burden of proof resting on the claimant to prove the existence of an anti-competitive practice and the active involvement of the defendant therein as well as the quantifiable loss in which the infringement had resulted⁴⁷⁹ made it quite difficult for private parties

cartelists. See PEYER, S., AHRC Project, “Germany. Comparative Private Enforcement & Consumer Redress in the EU”, at p. 19.

⁴⁷⁷ See MIEGE, C., “Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB”, in the Workshop “Remedies and Sanctions in Competition Policy”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 18-19.

⁴⁷⁸ See THOMAS, S., “Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), e-Competitions, January 2007-I, N° 12706.

⁴⁷⁹ See MIEGE, C., “Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB”, in the

to bring antitrust damages actions. However, changes brought about by the 7th Amendment to the German Act against Restraints of Competition and developments in the case law on private antitrust enforcement have facilitated bringing antitrust damages claims in Germany.

The 7th Amendment to the German Act against Restraints of Competition entered into force on July 1st, 2005. Contrary to the previous law, according to which these claims required a violation of a provision that serves to protect another person,⁴⁸⁰ it conferred a right to compensation to persons affected by a breach of the German or EU competition rules.⁴⁸¹ The Act defined affected persons as competitors or other market participants impaired by the infringement. Anyone who intentionally or negligently commits an infringement of Articles 101 and 102 TFEU, or violates a provision of the German Competition Act or a decision taken by the German competition authority is liable for the damages caused by the infringement to affected persons.⁴⁸² As a result, infringements of the EU competition rules are treated in the same manner as breaches of the German competition rules.

Nevertheless, the law did not contain any provision on whether indirect purchasers would also be entitled to claim damages.⁴⁸³ It has been suggested that they would have a right to claim damages arguing that the term “market participants” seems to be inspired by the Act Against Unfair Competition, which includes in that term consumers and businesses that have no direct relationship to the party infringing upon unfair competition.⁴⁸⁴ This amendment is thus likely to have facilitated antitrust damages

Workshop “*Remedies and Sanctions in Competition Policy*”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 18-20.

⁴⁸⁰ See BÖGE, U., “Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 199.

⁴⁸¹ Section 33(1) of the German Act against Restraints of Competition.

⁴⁸² Section 33(3) of the German Act against Restraints of Competition.

⁴⁸³ See BUNDESKARTELLAMT, “*Private Kartellrechtsdurchsetzung. Stand, Probleme, Perspektiven*”, Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005, at p. 7.

⁴⁸⁴ See WURMNEST, W., “A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition”, *German Law Journal*, Vol. 06, No. 08, 2005, p. 1173-1190, at p. 1182. In fact, the right of indirect purchasers to bring antitrust damages claims has now been confirmed by the Federal Court of Justice. See Federal Court of Justice, Judgment of June 28th, 2011, KZR 75/10, ORWI.

actions, since it also widened standing of potential claimants to indirect purchasers.⁴⁸⁵ As to passing-on, Section 33(3) states that it shall not be excluded that damage exists when goods or services that have been purchased at an excessive price are resold. Consequently, claimants can bring a damages action even if they have passed the higher cartel-price on to their customers, provided that they have still suffered some harm by the competition infringement. This in turn limits the passing-on defense.⁴⁸⁶

Moreover, not only Commission Decisions, but also NCA Decisions and decisions of the courts of the Member States that establish an infringement of Article 101 or 102 TFEU are binding on the courts before which antitrust damages actions are brought as regards the existence of the infringement. Similarly, the decisions of the German competition authority finding an infringement of the German antitrust rules will bind German courts – as far as the existence of an infringement is concerned – when they decide private damages claims.⁴⁸⁷

The 7th Amendment to the Act Against Restraints of Competition also extended the three-year limitation period for bringing a damages claim by providing that the limitation period is suspended with the initiation of antitrust proceedings by the Commission or the national competition authorities or courts of the Member States.⁴⁸⁸

⁴⁸⁵ This would also be in line with the ECJ ruling in *Courage*, according to which any individual harmed by an infringement of the EU competition rules may seek compensation for the loss caused to him as a result of the infringement.

⁴⁸⁶ See THOMAS, S., “Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), *e-Competitions*, January 2007-I, N° 12706.

⁴⁸⁷ Section 33(4) of the German Act Against Restraints of Competition. As regards Commission Decisions, the reference to their binding character is merely aimed at providing a clarification, since these decisions already bind national courts pursuant to Article 16 of Regulation 1/2003. The extension of the binding effect to decisions by foreign competition authorities and courts was criticized by the Monopolies Commission during the elaboration of the 7th Amendment of the German Competition Act, since the binding effect of administrative decisions is not limited to claims against parties addressed by the decision. Consequently, even parties that are not addressees of the decision or could not duly participate in the administrative proceedings will not be able to defend themselves against the alleged antitrust violation before German courts. See WURMNEST, W., “A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition”, *German Law Journal*, Vol. 06, No. 08, 2005, p. 1173-1190, at p. 1186. According to the Monopolies Commission, the binding effect should be limited to the addressees of the decision since these are the only ones that can appeal the decision. Moreover, in this manner there would be larger incentives for companies to apply for leniency. See MONOPOLKOMMISSION, “*Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*”, Sondergutachten der Monopolkommission gemäß § 44. Abs. 1 Satz 4 GWB, at p. 24.

⁴⁸⁸ See BÖGE, U., “Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 199

These changes seemed to have increased damages claims in Germany.⁴⁸⁹ Research undertaken by the German competition authority on the extent of private enforcement in Germany on the basis of data from the year 2004 found that, during that year, 240 decisions involving an antitrust violation were registered and in 68 cases antitrust claims were used as a sword. In 38 of these cases damages were claimed and 19 of them were successful.⁴⁹⁰ However, the investigation revealed that most of the actions brought concerned abuses of a dominant position or vertical agreements, but victims of hardcore cartels have at that time only been awarded damages in one claim, namely the *Vitamins* case,⁴⁹¹ although several equivalent proceedings were settled.⁴⁹² More recent research covering the period between 2004 and 2009 shows that other remedies are usually preferred over damages claims, although damages are sometimes requested together with a primary remedy for injunction. However, monetary claims are also made more frequently as unjust enrichment claims.⁴⁹³

In the *Vitamins* case, the Regional Court of Dortmund held that the claimant fell within the protective character of Article 101 TFEU or its German equivalent, Section 1 of the Act Against Restraints of Competition, when it was directly and objectively affected and was an identifiable market participant. Consequently, it is not necessary that the anti-competitive behavior be directed against a particular person for the provision to be applicable to the claimant. The Court therefore awarded almost €1.6 million in damages to a confectionary manufacturer who had bought products from the *Vitamins* cartel.⁴⁹⁴

⁴⁸⁹ See PEYER, S., AHRC Project, “Germany. Comparative Private Enforcement & Consumer Redress in the EU”, at p. 2.

⁴⁹⁰ See BUNDESKARTELLAMT, “Private Kartellrechtsdurchsetzung, Stand, Probleme, Perspektiven”, Diskussionspapier für die Sitzung des Arbeitskreises Kartellrecht am 26. September 2005, at p. 4.

⁴⁹¹ See BÖGE, U., “Up and Running, or is it? Private enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 197-198. See Regional Court of Dortmund, Judgment of April 1st, 2004, 13 O 55 /02.

⁴⁹² See Federal Court of Justice, Judgment of November 23rd, 2004, KZR 11/04 or Düsseldorf Higher Regional Court, VI U 37/04, and BÖGE, U., “Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives”, *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 198.

⁴⁹³ See PEYER, S., AHRC Project, “Germany. Comparative Private Enforcement & Consumer Redress in the EU”, at p. 19.

⁴⁹⁴ Regional Court of Dortmund, Judgment of April 1st, 2004, 13 O 55 /02.

Nevertheless, two other follow-on actions brought as a consequence of the *Vitamins* cartel that were decided by the Regional Court of Mannheim and the Regional Court of Mainz before the ruling of the Regional Court of Dortmund, denied the claimants the right to damages on the grounds that the cartel had to be specifically directed at the claimant in order for it to be entitled to damages. The judgment of the Regional Court of Mannheim was upheld by the Higher Regional Court of Karlsruhe,⁴⁹⁵ but that decision was in turn appealed to the Federal Court of Justice.⁴⁹⁶ Eventually the parties settled the case out of court and the appeals were withdrawn.⁴⁹⁷

Some commentators have argued that the rulings of the regional courts in question constituted a violation of the principle of effectiveness, as they did not take into account the ECJ judgment in *Courage*.⁴⁹⁸ The Regional Court of Mannheim expressly stated that the case did not have anything to do with the ECJ ruling, since the latter concerned the right of a co-contractor to damages, and in the case at hand a customer's claim was at stake.⁴⁹⁹ Nonetheless, as has rightly been submitted, customers of a cartel member cannot be deprived of their right to damages only because the cartel is not intentionally directed at them, but all market participants.⁵⁰⁰

⁴⁹⁵ Higher Regional Court of Karlsruhe, Judgment of January 28th, 2004, WuW, Section E DE-R, p. 1229.

⁴⁹⁶ See MIEGE, C., "Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", in the Workshop "Remedies and Sanctions in Competition Policy", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 31.

⁴⁹⁷ See BÖGE, U., "Up and Running, or is it? Private Enforcement – the Situation in Germany and Policy Perspectives", *E.C.L.R.*, Volume 27, Issue 4, 2006, p. 197-205, at p. 204.

⁴⁹⁸ See ANDRELANG, C., "Damages for the Infringement of Art. 81 EC by Cartel Agreements according to sec. 33(3) GWB: The Changes of Law concerning the 'Protective Law' Requirement and the 'Passing On' Defence", *World Competition* 30(4), 2007, p. 573-593, at p. 592, and MIEGE, C., "Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", in the Workshop "Remedies and Sanctions in Competition Policy", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 30-31.

⁴⁹⁹ Since, in the light of *Courage*, any individual has a right to damages, it does not matter whether the claimant is a co-contractor or a third party.

⁵⁰⁰ See MIEGE, C., "Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB", in the Workshop "Remedies and Sanctions in Competition Policy", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 30. Moreover, as stated above, it has been settled in *Manfredi* that third parties may also seek damages for harm caused by an antitrust violation.

As to the legal costs of damages actions, lawyers' fees and court fees are contained in tables of fixed tariffs, and the parties are not allowed to deviate from them. The fees depend on the amount in dispute and a multiplier is applied to the tariff in question. The multiplier is determined on the basis of the steps taken at the various stages of the legal proceedings.⁵⁰¹ The lawyers' fees depend on the nature of the proceedings, but the specific effort required in a particular case is not considered as such, but cases involving a small amount are assumed to require less effort to resolve. In civil litigation, the lawyer is entitled to a case-handling fee and a hearing fee. If a dispute is settled, the lawyer can charge an additional settlement fee. Court fees must be paid when the action is brought, but if the action succeeds, the claimant can recover the cost paid in advance from the defendant.⁵⁰²

Nevertheless, in antitrust damages cases, the claimant may request the court to adjust the case value to its financial situation if it would considerably be jeopardized if the claimant had to bear the full litigation costs. The court may require the claimant to plausibly demonstrate that its costs will not be covered by a third party. Accordingly, the party will only have to pay the fees of its lawyer corresponding to the adjusted case value.⁵⁰³

A party and lawyer can also agree on hourly fees, provided that they are not lower than the fees provided by statute. Such higher fees can generally not be recovered from the other party since the principle of full fee shifting is only limited to fixed fees. The costs of the proceedings are therefore confined to the costs fixed by the statutes regardless of whether the party and its lawyer have agreed to another type of remuneration for the lawyer.⁵⁰⁴

Until recently, contingency fees were prohibited in Germany.⁵⁰⁵ Nevertheless, in 2006, the German Federal Constitutional Court held that a complete ban was contrary to the

⁵⁰¹ See WAGNER, G., "Litigation costs and their recovery: the German experience", *C.J.Q.* 28(3), 2009, p. 367-388, at p. 367-370.

⁵⁰² *Ibid.*, at p. 370-372.

⁵⁰³ Section 89a of the Act Against Restraints of Competition.

⁵⁰⁴ See WAGNER, G., "Litigation costs and their recovery: the German experience", *C.J.Q.* 28(3), 2009, p. 367-388, at p. 374-378.

⁵⁰⁵ Section 49 b (2) of the Rules and Regulations for the Bar.

constitutional right of the professional freedom of lawyers, since potential claimants could be deterred from enforcing their rights due to the risk of losing and, the resulting obligation to bear the costs of the litigation.⁵⁰⁶ Following this ruling, the Lawyer's Remuneration Act was amended in 2008 in order to allow contingency fees. But they are limited to cases where the claimant would otherwise not be able to enforce its rights because of its financial situation.⁵⁰⁷ The agreement on remuneration must contain the estimated remuneration by statute and, if applicable, the agreed remuneration for which the lawyer would be willing to accept the case, as well as which remuneration would be applicable and under which conditions.⁵⁰⁸ In addition, contingency fees will not apply to costs that can be recovered under fee shifting.⁵⁰⁹

The possibility of adjusting the litigation costs of the claimant in a meritorious antitrust damages action⁵¹⁰ if its financial situation would otherwise be jeopardized considerably appears to enhance the bringing of such actions in Germany. Moreover, the predictability of the costs helps assessing the possible risks of bringing a claim. Nevertheless, in order to make actions by consumers with scattered claims feasible, adjustments should be made to the rules on contingency fees in order to ensure effective redress.

One of the most interesting developments so far is the damages claims brought as a follow-on action to the decision of the German competition authority to fine the members of the concrete cartel, which operated on the cement market between 1989 and 2002.⁵¹¹ The claim was brought by a Belgian undertaking, "Cartel Damage Claims SA", which was specifically founded for the purpose of antitrust litigation.⁵¹² The Cartel

⁵⁰⁶ Federal Constitutional Court, Judgment of December 12th, 2006, Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 BvR 2576/04.

⁵⁰⁷ Section 4a(1) of the Lawyer's Remuneration Act.

⁵⁰⁸ Section 4a(2) of the Lawyer's Remuneration Act.

⁵⁰⁹ Section 4a(3) of the Lawyer's Remuneration Act.

⁵¹⁰ See WAGNER, G., "Litigation costs and their recovery: the German experience", *C.J.Q.* 28(3), 2009, p. 367-388, at p. 374-375.

⁵¹¹ See THOMAS, S., "De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA), *e-Competitions*, February 2007-II, N° 13224.

⁵¹² See THOMAS, S., "Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), *e-Competitions*, January 2007-I, N° 12706.

Damage Claims SA bought the damages claims from 29 customers, who had allegedly been harmed by the concrete cartel⁵¹³ and brought the claims in the name of the company before the Regional Court of Düsseldorf. The idea was to render the litigation process more efficient for the claimants⁵¹⁴ by bundling the claims into one legal person, thus creating economies of scale, which would reduce procedural efforts and increase informational synergies as in class actions. The Cartel Damage Claims SA bought the claims for a symbolic amount of €100 and committed to pass on to the harmed customers approximately 85% of any damages awards. Moreover, the customers were to bear parts of the procedural costs by advanced payment.⁵¹⁵ In its interlocutory judgment of February 21st, 2007, the Regional Court of Düsseldorf recognized the claimant's right to bring the claim.⁵¹⁶ The defendant concrete producers appealed that decision, but their appeal was rejected by the Higher Regional Court of Düsseldorf in May, 2008.⁵¹⁷ The ruling of the Regional Court of Düsseldorf has been upheld by the German Federal Court of Justice.⁵¹⁸ But due to the administrative cost of solicitation and collection of assignments of individual claims, this model is only likely to work if the number of claimants is limited and the individual damages claims are considerable.⁵¹⁹

In the view of the German Federal Ministry of Economics and Technology and the Federal Cartel Office, the 7th Amendment of the Act Against Restraints of Competition implemented measures necessary for the effective enforcement of antitrust damages claims and there was no need to take further action in Germany.⁵²⁰ Nevertheless,

⁵¹³ See THOMAS, S., "De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA), *e-Competitions*, February 2007-II, N° 13224.

⁵¹⁴ See THOMAS, S., "Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), *e-Competitions*, January 2007-I, N° 12706.

⁵¹⁵ See THOMAS, S., "De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA), *e-Competitions*, February 2007-II, N° 13224.

⁵¹⁶ Press release of the Regional Court of Düsseldorf No. 02/2007, available at <http://www.lg-duesseldorf.nrw.de/presse/pressearchiv/07-02.pdf>.

⁵¹⁷ Higher Regional Court of Düsseldorf, Judgment of May 14th, 2008 in Case No. VI-U (Kart) 14/07.

⁵¹⁸ See Judgment of the Federal Court of Justice of April 7th, 2009 in Case No. KZR 42/08.

⁵¹⁹ See WAGNER, G., "Collective redress – categories of loss and legislative options", *L.Q.R.*, 127(Jan), 2011, p. 55-82, at p. 75.

⁵²⁰ See Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission "Damages actions for breach of the EC antitrust rules", at p. 1-2.

arguably these amendments are not sufficient to eliminate all obstacles to private enforcement in Germany, especially for consumers, as will be explained in the following section.

3.3.2. Main Obstacles to Private Enforcement

Despite the amended Competition Act, obstacles to private enforcement of antitrust damages claims remain. The main problematic issue is that the Competition Act does not ease the burden of proof for claimants wishing to bring stand-alone actions, but will only make it easier to bring follow-on actions. Since competition authorities with wide powers of inspection are not able to detect and prove all hardcore cartels, it is virtually impossible for private claimants to do so under the current rules on evidence and burden of proof. Consequently, stand-alone actions will, as the law stands, neither serve as a complement to public enforcement nor ease the burden on the competition authorities in this type of competition infringement.⁵²¹ Under Section 810 of the Civil Code, the claimant can inspect documents in the possession of another person, but only if they have been drawn up in the interest of the claimant. The condition limits the possibilities of claimants being able to rely on access to documents relating to an antitrust violation since they would not have been created in their interest. However, once the antitrust violation has been established, courts have frequently ordered the defendant to disclose information if the claimant needs additional information. Similarly, in follow-on actions claimants will also have access to documents in the possession of the competition authority, although access will not be granted to leniency documents. But even with regard to such documents, the lawyer of the injured party has a right to inspect the file, unless the investigation would be put at risk.⁵²²

Moreover, in most cases, the essential facts and figures needed to quantify damages are not available. However, the judge may, pursuant to Section 287 of the German Code of Civil Procedure, estimate the antitrust damage by taking into account the proportion of the benefit that the cartel member has derived from the infringement. But even in this

⁵²¹ See BERRISCH, G.M., “Kartellrechtliche Schadensersatzansprüche nach der 7. GWB – Novelle. Eine Einschätzung der Zukunft privater Kartellrechtsdurchsetzung mittels Schadensersatzklagen in Deutschland”, *WuW* 9/2005, p. 878-888, at p. 883-888.

⁵²² See PEYER, S., AHRC Project, “Germany. Comparative Private Enforcement & Consumer Redress in the EU”, at p. 11.

case the estimation must be based on solid factual grounds and be plausible and verifiable.⁵²³ Nonetheless, it is also possible to split between the basis for and the amount of the damages claim. In fact, in the majority of damages claims the aim is to establish an obligation to pay compensation for the damages caused, and then the amount of damages is often established within the framework of a settlement.⁵²⁴

There are also no collective damages actions available for consumers and businesses, which have suffered loss as a result of an infringement of competition rules. Consequently, in particular consumers who have suffered comparatively small individual losses are lacking incentives to bring antitrust damages actions. Collective actions are only available for applying for injunctions. Initially, the 7th Amendment to the Act Against Restraints of Competition only entitled associations for the promotion of commercial interests to do so, whereas consumer associations lacked standing.⁵²⁵ The latest amendment, the 8th Amendment to the Act Against Restraints of Competition, which entered into force on June 30th, 2013, now also allows consumer associations to bring an action for injunction in certain circumstances.⁵²⁶

Furthermore, the 7th Amendment to the Act Against Restraints of Competition conferred representative associations a right to order an undertaking that has infringed competition rules to pay an amount equivalent to the additional proceeds, which it has incurred through its anti-competitive behavior.⁵²⁷ The 8th Amendment to the Act Against Restraints of Competition extended this right to consumer associations. However, the additional proceeds are to be paid to the Treasury, and the representative association is only entitled to having its legal costs reimbursed, which in practice does not provide any incentive to bring such a claim because in the best-case scenario, the representative association will only get its costs reimbursed.⁵²⁸ In addition, the right to deprive

⁵²³ See THOMAS, S., “Damages claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschränkungen), *e-Competitions*, January 2007-1, N° 12706.

⁵²⁴ Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission “Damages actions for breach of the EC antitrust rules”, at p. 7.

⁵²⁵ Section 33(2) of the German Act Against Restraints of Competition, including the 7th Amendment.

⁵²⁶ Section 33(2) of the German Act Against Restraints of Competition, including the 8th Amendment.

⁵²⁷ Section 34a of the German Act Against Restraints of Competition.

⁵²⁸ See “Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle”, Sondergutachten der Monopolkommission gemäss § 44. Abs. 1 Satz 4 GWB, at. p. 51.

infringers from their profits is subsidiary to the German competition authority's right to order the skimming off of benefits.⁵²⁹ This explains why associations have not made use of this type of procedure.⁵³⁰

Nonetheless, in the field of investment law, another instrument that is similar to a collective action was introduced in 2005, and could serve as inspiration also for resolving antitrust damages claims. The Capital Investor Test Case Litigation Act provides for test case litigation for capital investors.⁵³¹ The call for such a new legal instrument became evident, *inter alia*, when approximately 15.000 investors brought liability claims for statements made in a prospectus (*Prospekthaftungsansprüche*) against the Deutsche Telekom AG. This instrument makes it possible to bring a test case when there are multiple capital market disputes involving similar issues.⁵³² The test case is used to decide common legal and factual questions and they are then applied to the individual cases.⁵³³

But the use of test case litigation for capital investors is limited as it only applies to capital investment law.⁵³⁴ It can thus not be used in antitrust cases, but lessons could be learned from it when designing a collective damages action for antitrust violations. The main problems for consumers harmed by antitrust violations in Germany therefore remain: they lack incentives to sue and there is no real possibility of obtaining compensation for their loss, as the costs of individual stand-alone actions would by far exceed the possible compensation awarded.

⁵²⁹ Section 34a of the Act Against Restraints of Competition.

⁵³⁰ See PEYER, S., AHRC Project, "Germany. Comparative Private Enforcement & Consumer Redress in the EU", at p. 10.

⁵³¹ Kapitalanleger-Musterverfahrensgesetz.

⁵³² See REUSCHLE, F., "Das Kapitalanleger-Musterverfahrensgesetz" in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, "Band 1: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions", Conference on February 24th, 2006 in Vienna, p. 66-72, at p. 67.

⁵³³ See Germany – National Report, November 15th, 2006, prepared for the Consumer Redress Study, at p. 22.

⁵³⁴ See STADLER, A., "Collective Action as an Efficient Means for the Enforcement of European Competition Law" in BASEDOW, J. (ed.), "Private Enforcement of EC Competition Law", Kluwer Law International, Alphen aan den Rijn, 2007, p. 195-213, at p. 203-204.

To conclude, although Germany is one of the Member States with most private enforcement, it has to be noted that a majority of antitrust damages actions are brought by undertakings. Damages actions are also the least preferred remedy of private enforcement, and the success rate of such claim is estimated to be 26%.⁵³⁵ Therefore, the redress possibilities of consumers should be enhanced and access to evidence should be made more feasible in stand-alone cases.

3.4. France

3.4.1. General Overview

Any individual that has suffered harm as a result of the breach of the French or the EU competition rules can bring an antitrust damages claim in France. These claims are governed by the general law of civil liability, i.e. Article 1382 of the French Civil Code. Pursuant to Article 1382, “*Any act of man, which causes damages to another, obliges the person at fault to repair it*”. A wrongful act is deemed to exist when a civil or criminal law has been violated. Intent is not required. Consequently, a wrongful act would exist when it has been proven that EU competition law has been infringed.⁵³⁶

The action for damages can be brought before civil or commercial courts and, in principle, even before criminal courts if an individual has fraudulently taken a personal and decisive part in the design, organization or implementation of anti-competitive practices, and the injured party is claiming damages for the harm caused by the antitrust violation.⁵³⁷

In France, there are more antitrust damages actions than what was found in the Ashurst Report. The French Rapporteur for the research project “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU*” regarding the period 1999-2012 identified indeed approximately 80 cases of private litigation (i.e. also

⁵³⁵ See PEYER, S., AHRC Project, “*Germany. Comparative Private Enforcement & Consumer Redress in the EU*”, at p. 20-21.

⁵³⁶ See HAHN ROSOCHOWICZ, P., “*Deterrence and the relationship between public and private enforcement of competition law*”, in the Workshop “*Remedies and Sanctions in Competition Policy*”, Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 9-10.

⁵³⁷ See Article L.420-6 of the French Commercial Code and CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 3,.

including other types of claims than claims for damages) during the research period in question. Most of the follow-on actions were claims for damages brought for cartel infringement decisions, although antitrust damages actions are often decided through arbitration or settled. It should also be noted that a significant number of damages actions are not successful. Moreover, apart from proving the antitrust violation, the claimant must also prove fault, the existence of damage with certain characteristics, and a causal relationship between the infringement and the harm suffered.⁵³⁸ These last requirements could explain why many follow-on damages actions have not been successful in the end.

In addition, there appears in general to be more stand-alone actions than follow-on actions,⁵³⁹ which is surprising since proving an antitrust violation is not an easy task. But this can at least partly be explained by the fact that such actions are often based on a contractual relationship, where an action for nullity is sometimes brought in combination with a claim for damages, although pure claims for damages have also been brought.⁵⁴⁰

It is also striking that there are practically no actions brought by consumers, which could be explained by the fact that their individual losses are comparatively low.⁵⁴¹ An important obstacle to consumers bringing antitrust damages actions was the flaws with the collective actions available before the adoption of the new Consumer Act in March 2014.⁵⁴² Until then, there were two different types of collective actions which could be used for claiming damages in France: an action to assert a collective interest and an action brought on behalf of several individuals. An action to assert collective consumer interests could be brought by approved consumer associations.⁵⁴³ A direct or indirect collective injury of consumers had to exist, and it had to be different from the injuries

⁵³⁸ See CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 3-6.

⁵³⁹ *Ibid.*, at p. 3.

⁵⁴⁰ *Ibid.*, at p. 7 and e.g. *Emirates Case*, Court of Appeal of Paris, Judgment of December 14th, 2011.

⁵⁴¹ See CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 5.

⁵⁴² Law No. 2014-344 of March 17th, 2014 on consumer protection.

⁵⁴³ Article L.422-1 of Law No. 93-949, the Consumer Code.

suffered personally by the consumers,⁵⁴⁴ as it was not possible to repair individual injuries under this action.⁵⁴⁵ Moreover, this type of action could only be brought when an offense had been committed. Its use was therefore very limited, as criminal laws must be strictly interpreted.⁵⁴⁶

Actions could be brought on behalf of several individuals when several consumers had been injured as a result of the actions of the same professional.⁵⁴⁷ Only approved consumer associations who represented consumers at a national level were entitled to bring these actions. Furthermore, the prior authorization of at least two consumers that allowed the association to sue on their behalf was required.⁵⁴⁸ The association could then solicit the authorization of more potential victims, for instance, in newspapers and magazines, or if expressly permitted, on television or radio. A consumer could withdraw his authorization and pursue the action himself. If the collective action was unsuccessful, consumers could no longer bring the action themselves, if they had not chosen to withdraw their authorization before the outcome. If the consumer association won the action, the damages and interests awarded had to be attributed to the injured consumers because only the repair of the individual injuries of consumers was allowed under this type of action. An association could also simultaneously bring an action on behalf of several individuals and an action to assert collective interest of consumers.⁵⁴⁹

The advantage of this action was that consumer associations paid the trial costs and, hence, consumers did not have to bear the financial risk normally involved in bringing

⁵⁴⁴ See LONGUET, A. and DIGUERES, D., “Travaux pour l’introduction d’une action de groupe en France” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, “Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions”, Conference on February 24th, 2006 in Vienna, p. 55-58, at p. 56.

⁵⁴⁵ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 303.

⁵⁴⁶ See France – National Report, November 15th, 2006, prepared for the Consumer Redress Study, at p. 18.

⁵⁴⁷ Article L.422-1 of Law No. 93-949, the Consumer Code. Apart from the possibility of bringing a representative action on behalf of consumers, such an action is also possible for investors pursuant to Article L.452-2(1) of the Monetary and Financial Code and, pursuant to Article L.142-3(1) of the Environmental Code, for the protection of the environment.

⁵⁴⁸ Article L.422-1 of the Consumer Code.

⁵⁴⁹ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 303.

legal proceedings, but would be compensated in case the action was successful.⁵⁵⁰ The drawback was that the association needed the mandates of every claimant instead of a collective mandate.⁵⁵¹ The associations found that their action was paralyzed by the heaviness and costs of the administration of the mandates.⁵⁵²

Several initiatives have been taken in the last decade with a view to improving the possibility of using collective actions. In May 2005, a website, ClassAction.fr, was created in order to enable the general public to go online to join in pending court proceedings. However, the law firm Avocats Du Nouveau Siècle brought actions against the administrators of the ClassAction.fr website and against the company Class Action.fr. The First Instance Civil Court of Lille held that it was illegal to advertise Class Action.fr's legal services through the website, since it is a commercial company and not a legal entity authorized to provide legal advice. Moreover, its practice constituted illicit acts of solicitation, thus amounting to unfair competition with regard to the rest of the legal profession.⁵⁵³ Consequently, the company was ordered to end these practices.⁵⁵⁴

The French government also intended to enhance collective actions, but at first it did not lead to any results because consumer associations were divided on the model of collective action that should be adopted, and there was also opposition from the

⁵⁵⁰ See France – National Report, November 15th, 2006 prepared for the Consumer Redress Study, at p. 15. Hereinafter referred to as “France – National Report”.

⁵⁵¹ See “Actions de groupe: le rendez-vous manqué de la LME”, usinenouvelle.com, June 18th, 2008, available at <http://www.usinenouvelle.com/article/actions-de-groupe-le-rendez-vous-manque-de-la-lme.141271>.

⁵⁵² See LONGUET, A. and DIGUERES, D., “Travaux pour l'introduction d'une action de groupe en France” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, “Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions”, Conference on February 24th, 2006 in Vienna, p. 55-58, at p. 56.

⁵⁵³ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 304.

⁵⁵⁴ *Ibid.*, at Note 9. Also several consumer associations brought an action against Class Action.fr. arguing that the services offered by it constituted illicit solicitation. The Tribunal de Grande Instance of Paris ruled in favor of the claimants, and prohibited the company to collect mandates to sue online. See *op. cit.*, at p. 304.

professional bodies, which feared that such actions would lead to a U.S. style of litigation.⁵⁵⁵

One important incentive to reform the collective actions was motivated by the decision by the Competition Council of November 2005 to fine the mobile operators Orange France, SFR and Bouygues Télécom for fixing prices and market shares. In order to bring legal proceedings to repair the losses suffered by consumers as a consequence of the price fixing, the consumer association UFC-Que-Choisir set up a website so that consumers could join the action.⁵⁵⁶ On appeal the Court of Appeal held that this constituted canvassing and was therefore prohibited by Article L.422-1 of the Consumer Code.⁵⁵⁷ This ruling was upheld by the Supreme Court.⁵⁵⁸

This was the first case in France in which a consumer association brought an antitrust damages action.⁵⁵⁹ It is also noteworthy that early on in the proceedings UFC-Que-Choisir had claimed that it would not be able to deal with more than 40,000 files due to the limitations of the collective action procedure,⁵⁶⁰ although the potential number of claimants was 20 million (i.e. the number of mobile phone service subscribers). Nevertheless, eventually less than 1% of the subscribers decided to join the action,⁵⁶¹ which also demonstrates the difficulties with collective actions based on the opt-in model as the group of claimants risks to be only a fraction of the actual number of victims.

⁵⁵⁵ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 305.

⁵⁵⁶ See HODGES, C., *The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 84.

⁵⁵⁷ *UFC-Que-Choisir v. Bouygues*, Court of Appeal, Judgment of January 22nd, 2010.

⁵⁵⁸ *UFC-Que-Choisir v. Bouygues*, Court of Cassation, Judgment of May 26th, 2011.

⁵⁵⁹ See IDOT, L., “Private Enforcement of Competition Law – Recommendations Flowing from the French Experience” in BASEDOW, J. (ed.), “Private Enforcement of EC Competition Law”, Kluwer Law International, Alphen aan den Rijn, 2007, p. 85-106, at p. 96.

⁵⁶⁰ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 306.

⁵⁶¹ See UFC-QUE-CHOISIR, “Trade practices and competition / Mobile telephone cartel”, presentation at the CLEF meeting on May 17-18th, 2007, Brussels, available at http://www.clef-project.eu/media/d_GaellaPatettaUFCcasecartelmobile_75402.pdf.

Despite the fact that the French government had promised to enhance collective actions, and the drawbacks of the existing ones were considerable, it was not until March 2014 that a collective action was introduced in France by the Consumer Act.⁵⁶² The new act provides for collective follow-on actions after a decision of French or EU competition authorities. However, only national consumer associations may bring such a claim in order to obtain compensation for individual harm suffered by consumers in the same or identical situation and which has been caused by the same professional or professionals.⁵⁶³ The action is based on the “opt-in” model, so once the judge has decided on the admissibility of the action and has ruled on the liability of the professional, he or she will identify the group, and will decide on the conditions for joining the group.⁵⁶⁴ In collective antitrust damages actions, the liability of the professional established by the competition authority binds the judge.⁵⁶⁵

The judge will determine the harm to be compensated for each consumer or each category of consumers which forms part of the group, as well as the amount or all the elements needed to assess the harm.⁵⁶⁶ To this end, the judge may order any measure lawfully available which is necessary to preserve the evidence and the disclosure of documents.⁵⁶⁷ This is important because one of the reasons why the previously existing collective actions in France were considered to be of limited use, was that the judge in civil cases did not have discovery or compulsory powers of investigation at his or her disposal.⁵⁶⁸ Moreover, once the Directive on Antitrust Damages Actions has been implemented in France, national law must at least provide for minimum disclosure of evidence and sanctions for failure or refusal to comply with a disclosure order and the destruction of evidence.⁵⁶⁹

⁵⁶² Law No. 2014-344 of March 17th, 2014 on consumer protection (hereinafter “Consumer Act”).

⁵⁶³ Articles L. 423-1 and L. 423-17 of the Consumer Act.

⁵⁶⁴ Article L. 423-3(1) of the Consumer Act.

⁵⁶⁵ Article L. 423-17 of the Consumer Act.

⁵⁶⁶ Article L. 423-3(2) of the Consumer Act.

⁵⁶⁷ Article L. 423-3(3) of the Consumer Act.

⁵⁶⁸ *See* CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 11.

⁵⁶⁹ Articles 5 and 8 of the Directive on Antitrust Damages Actions.

The judge will also order the measures to be taken in order to notify group members of the liability of the professional, which will be undertaken at the cost of the professional.⁵⁷⁰ The time-limit for joining the group must be established to be between two and six months counting from the moment when the notification ordered by the judge has taken place.⁵⁷¹

There is also a simplified collective action for those cases in which the identity of the injured consumers is known and those consumers have suffered the same amount of harm. In these cases, the judge may order the professional to compensate directly and individually, within a time-limit and under the conditions established by the judge.⁵⁷² In case some of these consumers do not receive the compensation within the established time-limit, the association will represent them in the proceedings to enforce their rights under the judgment.⁵⁷³

It is also possible to decide on compensation through mediation, but only the association can participate in the mediation under the conditions fixed by legislation,⁵⁷⁴ and all settlements must be approved by the judge, who will assert that the settlement is conforming to the interests of those to which it will apply. The settlement also fixes the conditions for notifying the consumers concerned about the possibility of opting in, the time-limit, and conditions for opting in.⁵⁷⁵

The bringing of a collective action will also suspend the limitation period for individual damages claims, and it will start to run again from the date when a decision on the liability of the professional has become final. The new limitation period must not be shorter than six months.⁵⁷⁶

⁵⁷⁰ Article L. 423-4(1) and L. 423-4(2) of the Consumer Act.

⁵⁷¹ Article L. 423-5(1) of the Consumer Act.

⁵⁷² Article L. 423-10 of the Consumer Act.

⁵⁷³ Article L. 423-13 of the Consumer Act.

⁵⁷⁴ Article L. 423-15 of the Consumer Act.

⁵⁷⁵ Article L. 423-16 of the Consumer Act.

⁵⁷⁶ Article L. 423-20 of the Consumer Act.

A number of follow-on actions have been brought by undertakings. For example, in *Concurrence SA v. Sony* Concurrence SA brought a follow-on damages action after the Competition Council had decided that Sony, whose distributor was Concurrence SA, had breached Article L. 420-1 of the French Commercial Code, the French equivalent of Article 101 TFEU. The Commercial Court awarded Concurrence SA damages on the basis of a lump sum for the loss it had suffered as a result of Sony's anti-competitive practices, but when Sony appealed the decision, the Court of Appeal held that the causal relationship between all the practices and the damage could not be proven. Consequently, damages could only be awarded for the practices for which the causal relationship had been proved. Furthermore, the Court held that damages could not be awarded on the basis of a lump sum, but it was necessary to assess the exact amount of the injury suffered.⁵⁷⁷

Another follow-on damages action was brought by Sté Eco System against Peugeot after the ECJ had upheld a Commission Decision finding that Peugeot had infringed Article 101(1) TFEU by sending a letter to its distributors instructing them not to deliver cars to Eco System. The Commercial Court held that the breach by Peugeot had a direct influence on the evolution of Eco System's business activity, and there was a causal relationship between the infringement and the damage alleged by Eco System. Peugeot was therefore liable for compensation for the loss of operating income that had occurred while the letter sent to the distributors was in force. Nevertheless, the Court found that it could not be proven that the loss of business value, for which Eco System had also claimed damages, was a result of Peugeot's fault, because it did not rest entirely on sales of Peugeot cars.⁵⁷⁸

The French Competition Council has highlighted a risk for divergent decisions when an antitrust damages action is brought in parallel with a public enforcement action. This risk is, however, reduced in France thanks to the fact that the Court of Appeal of Paris is the only court of appeal both for appeals against the decisions of the Competition Council and of civil judges. Another risk is inefficiency of the public action in case the claimant prefers to bring an antitrust damages action before the Competition Council

⁵⁷⁷ *Concurrence SA v. Sony*, Paris Court of Appeal, Judgment of October 22nd, 1997.

⁵⁷⁸ *Sté Eco System v. Peugeot*, Paris Commercial Tribunal, Judgment of October 22nd, 1996.

has had an opportunity to conduct inspections in the premises of the alleged infringers of the competition rules, since this may prompt the suspected companies to destroy evidence. In such a case, the private action would not compensate for the lack of public enforcement.⁵⁷⁹

A sign of the preference for public enforcement is also the adoption of Law No. 2011-525, which prohibits access to “*documents prepared and held by the Competition Authority in exercising its powers of investigation, preparatory inquiry and decision-making*”.⁵⁸⁰ However, there are also procedural rules which make it possible to order pre-trial measures of inquiry if there is a legitimate reason to do so in order to maintain or establish proof of facts relevant for the outcome of the case,⁵⁸¹ or to order the production of all documents held by the other party or third parties, provided that there are no justified impediments for ordering the disclosure.⁵⁸² But a drawback is that the court cannot impose a sanction on a party which refuses to comply with the disclosure order.

The issue of access to evidence and burden of proof is also of relevance for the passing on defense. A number of follow-on actions have been brought in France following the infringement decisions concerning the *Vitamins Cartel* and the *Lysine Cartel*. In many of these cases, direct purchasers were not able to obtain damages because the courts considered that passing-on of the overcharge is a common commercial practice, and the claimants had not been able to demonstrate that they had not passed on the overcharge.⁵⁸³ The main problem in these cases were, however, the burden of proof on the claimants to show that they had not passed on the overcharge instead of requiring the defendant to invoke the passing-on defense, and show that the claimant had indeed passed on the overcharge to the next level in the distribution chain.

⁵⁷⁹ See CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 20.

⁵⁸⁰ Article 50 of Law No. 2011-525, May 17th, 2011, Simplification and improvement of the Law quality, amending Law No. 78-753 of July 17th, 1978.

⁵⁸¹ Article 145 of the French Code of Civil Procedure.

⁵⁸² Article 11 of the French Code of Civil Procedure.

⁵⁸³ See CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 13-14.

Compensation may in principle be claimed for different types of harm; including moral and material damage, actual loss and loss of profits. Notably, compensation may be obtained both for current and future damage. The compensation should be full compensation, which ultimately serves as a limitation to the courts' wide discretionary power in the assessment of damages. Some uncertainty still remains regarding the assessment of damage because courts do not have any obligation to specify the factors or the method that they have used to assess the damage.⁵⁸⁴

As to the costs of damages actions in France, the court fees are limited and should not generally constitute an obstacle to bringing claims.⁵⁸⁵ But the situation might be different if an expert is appointed, because then the claimant may have to pay a certain sum in advance,⁵⁸⁶ which could serve as a disincentive for bringing the claim if the costs are high and the outcome of the action is not certain. Moreover, lawyers' fees can be considerable,⁵⁸⁷ and contingency fees are not allowed.⁵⁸⁸ But it is possible to agree that depending on the outcome of the action, the lawyer may charge "complementary fees", provided that they constitute a reasonable portion of the fixed fees.⁵⁸⁹ In addition, the court fees are subject to fee shifting, whereas lawyers' fees are not,⁵⁹⁰ so the claimant must always pay the fees of its lawyer(s). If the costs are too high compared to the possible damages awards, the claimant might be discouraged from bringing the damages claim in the first place.

The limitation period for bringing antitrust damages actions is today five years from "*the day the holder of the right knew or should have known the facts allowing him to*

⁵⁸⁴ *Ibid.*, at p. 13-15.

⁵⁸⁵ See HODGES, C., VOGENAUER, S. and TULIBACKA, M., "*Costs and Funding of Civil Litigation: A Comparative Study*", at p. 11, available at <http://ssrn.com/abstract=1511714>.

⁵⁸⁶ See National Report on France prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 27

⁵⁸⁷ See HODGES, C., VOGENAUER, S. and TULIBACKA, M., "*Costs and Funding of Civil Litigation: A Comparative Study*", at p. 56, available at <http://ssrn.com/abstract=1511714>.

⁵⁸⁸ Article 10 of Act No. 71-1130 of December 31st, 1971 on the reform of certain legal professions.

⁵⁸⁹ See MAGNIER, V., "*The French Civil Litigation System, the Increasing Role of Judges, and Influences from Europe*" in HENSLER, D.R., HODGES, C. and TULIBACKA, M. (eds.), "*The Annals of the American Academy of Political and Social Science. The Globalization of Class Actions*", Sage Publications (CA), Volume 622, March 2009, p. 114-124, at p. 122, note 20.

⁵⁹⁰ See HODGES, C., VOGENAUER, S. and TULIBACKA, M., "*Costs and Funding of Civil Litigation: A Comparative Study*", 20, available at <http://ssrn.com/abstract=1511714>.

exercise it".⁵⁹¹ It is therefore shorter than the limitation period that was in force until the law of June 17th, 2008 established the current limitation period.⁵⁹² The limitation period may be interrupted and suspended for example if the claimant cannot bring the damages claim due to a legal impediment or *force majeure*,⁵⁹³ or the parties try to settle the claim through mediation.⁵⁹⁴ But in any case the suspension or interruption of the limitation period may not have the effect of extending the right to bring the claim beyond 20 years from the date of the existence of the right.⁵⁹⁵

3.4.2. Main Obstacles to Private Enforcement

The main obstacles to private enforcement in France include limited access to evidence and the burden of proof, especially when the claimant must prove secret anti-competitive practices. The claimant must prove all the facts of the case, the infringement, the existence of damage and the causal relationship between the infringement and the damage suffered. In addition, it must be able to assess the damage caused by the anti-competitive behavior, which is often challenging.

As to proving the infringement of the national competition rules, a decision of the French Competition Authority does not have a binding effect, although courts tend to take it into account.⁵⁹⁶ In this respect, the effect of the decision by a national competition authority is therefore different than that of Commission Decisions which have a binding effect as to the existence of an infringement of the EU competition rules although the claimant will still have to prove that the infringement has actually caused it damage.

More problematic is the situation when the public enforcement investigation has resulted in a commitment decision because such decisions do not settle the issue of liability. Therefore, it is unclear to what extent could a private party try to obtain access

⁵⁹¹ Article 2224 of the French Civil Code.

⁵⁹² See CHAGNY, M., AHRC Project, "*French Report. Competition law, private enforcement and collective redress in France*", at p. 8.

⁵⁹³ Article 2234 of the French Civil Code.

⁵⁹⁴ Article 2238 of the French Civil Code.

⁵⁹⁵ Article 2232 of the French Civil Code.

⁵⁹⁶ See CHAGNY, M., AHRC Project, "*French Report. Competition law, private enforcement and collective redress in France*", at p. 5.

to evidence in the file of the competition authority. In any case, it is not possible to disclose information which could only have been known through access to the file of the competition authority.⁵⁹⁷

Moreover, the proceedings in France are both long and costly. In particular, in follow-on cases, the public enforcement action can be very lengthy, which may explain why there have been comparatively few follow-on antitrust damages actions in France.⁵⁹⁸ As to the costs for bringing antitrust damages actions, experts are often appointed to remedy the lack of expertise on the part of judges in complex damages evaluations, and these experts do not always have the required expertise in all the different fields involved in the case, or may encounter difficulties in obtaining the documents needed to conduct investigations.⁵⁹⁹

The general cost rule is the “loser pays” principle,⁶⁰⁰ which means that if the outcome of the action is uncertain, the bringing of a claim for damages entails certain financial risks. However, the court may derogate from the cost allocation rules if there are justified reasons, in particular of equity, to do so.⁶⁰¹ This is also possible if equity or the economic situation of the losing party gives cause to adjusting the cost allocation rules.⁶⁰² Although the court fees are low, as lawyers’ fees can be considerable⁶⁰³ and experts might be needed in antitrust damages actions in order to demonstrate and quantify the damage, the incentives for bringing antitrust damages actions may not necessarily be sufficient.⁶⁰⁴ This would, in particular, be the case for consumers, whose individual harm might be low although the aggregate harm might be considerable. The fact that there have practically not been any antitrust damages actions brought by

⁵⁹⁷ See Article L.463-7 of the French Commercial Code and CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 11.

⁵⁹⁸ *Ibid.*, at p. 10.

⁵⁹⁹ See National Report on France prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 33.

⁶⁰⁰ Article 696(1) of the French Civil Code.

⁶⁰¹ Article 696(2) of the French Civil Code.

⁶⁰² Article 700 of the French Civil Code.

⁶⁰³ See HODGES, C., VOGENAUER, S. and TULIBACKA, M., “*Costs and Funding of Civil Litigation: A Comparative Study*”, at p. 56, available at <http://ssrn.com/abstract=1511714>.

⁶⁰⁴ See LESKINEN, C., “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121, at p. 102.

consumers, with the exception of the failed representative action brought by UFC-Que-Choisir, appears to support the conclusion that more efficient redress mechanisms and greater incentives might be required in order to ensure access to justice for consumers and full compensation of victims of antitrust violations.

The previous collective actions, which in fact were rather representative actions, were not very efficient, and they were seldom used. The main obstacles were arguably that a mandate from all claimants was required in order to bring the action. The costs of collective actions are also usually very high so, in practice, only law firms can bear the costs. It would consequently be necessary to permit advertising of a particular case and solicitation, if the court has admitted a collective action,⁶⁰⁵ since the prohibition on advertising is the reason why collective actions have not been successful in France in the past.⁶⁰⁶ Furthermore, lawyers should be allowed to charge fees depending on the outcome of the case.⁶⁰⁷

Other weaknesses of the previous collective action and the current one include that it is limited to consumers. Business associations may only bring an action before the civil or commercial court when there has been a direct or indirect damage to the collective interest of the profession or sector which they represent or to fair competition.⁶⁰⁸ This means that they cannot seek compensation of harm which they have suffered individually.⁶⁰⁹ This is problematic since especially SMEs might struggle with similar problems as consumers, i.e. that the possible damages awards are lower than the costs they might incur for bringing a claim for damages. Therefore, it would be necessary that they could also join forces in a collective action in order to seek redress for individual harm and not only in cases where their sector has been collectively damaged. One could for instance envisage that only a small part of a sector has suffered harm as a result of

⁶⁰⁵ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 310-311.

⁶⁰⁶ See France – National Report, November 15th, 2006, at p. 14.

⁶⁰⁷ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 311.

⁶⁰⁸ Article L.470-7 of the French Commercial Code.

⁶⁰⁹ See CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 9.

an antitrust violation. In such a case, it is debatable whether the action under Article L.470-7 of the Commercial Code would be applicable.

The new collective action is an improved version of the former representative action in that it allows an association to first bring an action to establish the liability of the defendant, and then parties who have suffered an injury are invited to come forward with their damages claims. However, they still need to opt in, which might make it difficult to achieve a significant number of group members in order for the action to have deterrent effect on the infringers. But it appears very unlikely that France would adopt a collective action that would allow one person to sue on behalf of a group of persons without requiring any prior mandate, since it would be contrary to constitutional and procedural principles inherent to French law.⁶¹⁰

As regards stand-alone actions, the situation is very challenging for claimants. For example, in order to demonstrate that the practice in question has harmed competition in the market, they must be able to provide information that allows an analysis of the market and the assessment of the economic effect of the practice on the market. This task is eased by the fact that the French minister in charge of economy may intervene before the civil courts and present conclusions and issue statements which may serve to resolve the case.⁶¹¹ Also, the Competition Council and the European Commission may act as *amicus curiae*, and the judge can make a preliminary reference to the ECJ under Article 267 TFEU.⁶¹² But, in practice, the possibility of requesting an opinion from the Competition Authority has not been used.⁶¹³ There is therefore room for improvement in order to make damages claims more effective.

⁶¹⁰ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 306.

⁶¹¹ See CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 20-22.

⁶¹² Article L.462-3 of the French Commercial Code.

⁶¹³ See CHAGNY, M., AHRC Project, “*French Report. Competition law, private enforcement and collective redress in France*”, at p. 11.

3.5. Spain

3.5.1. General Overview

The main principles governing the right to damages for antitrust violations in Spain are laid down in Competition Law 15/2007 of July 3rd and Unfair Competition Law 3/1991 of January 10th. Moreover, Article 1902 of the Spanish Civil Code contains a general rule on liability in tort, according to which a person is obliged to compensate the damage that his act or omission, by fault or negligence, has caused to another person. The claimant has hence to prove that the author of the damage has caused the damage to it by fault or by negligence. The damage must also be unjust, there must be a causal relationship between the harm and conduct, and the damage must be quantified.⁶¹⁴ As antitrust damages actions are tort claims, the limitation period is the same as for general tort actions. It will start to run either from the date on which the injured party became aware of the harm,⁶¹⁵ or the date when the action could be exercised.⁶¹⁶

Before Competition Law 15/2007 entered into force on September 1st, 2007, the old Competition Law 16/1989 of July 17th established that before damages actions based on the illegality of practices prohibited by that law could be brought, a final administrative competition decision had to exist.⁶¹⁷ The Spanish Supreme Court confirmed this in its *CAMPSA* ruling stating that Article 13(2) of Competition Law 16/1989 required a previous final decision by the Spanish competition authorities (or the Commission) establishing the existence of an anti-competitive conduct before a damages action could be brought. According to the Supreme Court, the existence of a final decision was a procedural requisite for the damages action, and if it did not exist, the courts and tribunals had no jurisdiction.⁶¹⁸ Consequently, under the old Competition Act, it was not possible to bring a stand-alone action for damages based on an infringement of the national competition rules.

⁶¹⁴ See JIMÉNEZ-LAIGLESIA, J. and MASÍA, J., “Examen de cuestiones de naturaleza práctica relativas a la aplicación privada del Derecho de la Competencia en España”, *Gaceta jurídica de la Unión Europea y de la Competencia*, No. 30, November-December 2012, p. 26-39, at. p. 29.

⁶¹⁵ Article 1968(2) of the Civil Code.

⁶¹⁶ Article 1969 of the Civil Code.

⁶¹⁷ Article 13(2) of Competition Law 16/1989 of July 17th.

⁶¹⁸ Judgment of the Civil Chamber of the Supreme Court No. 1262/1993, of December 30th, 1993.

Moreover, the Supreme Court incorrectly interpreted the ECJ ruling in *BRT v SABAM* with regard to direct effect by drawing the conclusion that national civil courts could only directly apply Articles 101(1) and 102 TFEU if that application was incidental, i.e. if the EU competition rules were not being invoked as a main plea of the claim, and the Commission or the Spanish Competition Tribunal had not initiated proceedings in the same case. The Supreme Court thus interpreted that only the national authorities whose competence to apply Articles 101(1) and 102 TFEU derived from Article 104 TFEU were competent to apply those articles directly, if they were invoked as a main plea.⁶¹⁹

However, in *BRT v SABAM*, the ECJ did not distinguish between the incidental and principal application of the EU competition rules. It clarified that Regulation 17 identified the national authorities, which are in charge of the public enforcement of competition rules. Although, in some Member States, these authorities also include certain courts,⁶²⁰ the Court held that this “*cannot exempt [such] a court before which the direct effect of Article 86 [now Article 102 TFEU] is pleaded from giving judgment*”.⁶²¹ The Court thus merely made a distinction between public and private enforcement of the EU competition rules,⁶²² but it did not limit the competence to directly apply those rules to certain courts. Further, it clearly stated that Articles 101 and 102 TFEU “*create direct rights in respect of the individuals concerned which national courts must safeguard*”.⁶²³ Consequently, the *CAMPSA* ruling not only erroneously construed the ECJ judgment, but in denying the direct effect of Articles 101 and 102 TFEU, it ignored one of the fundamental principles of EU law, i.e. the direct effect of EU law.⁶²⁴ By doing so it made it impossible for individuals to directly rely on Articles 101 and 102 TFEU in Spain in order to seek damages for antitrust violations.

⁶¹⁹ Judgment of the Civil Chamber of the Supreme Court No. 1262/1993, of December 30th, 1993.

⁶²⁰ Judgment in *BRT v SABAM*, 127/73, EU:C:1974:25, paragraphs 18-19.

⁶²¹ Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 20.

⁶²² See FERNÁNDEZ, C. and GONZALEZ-ESPEJO, P., “Actions for Damages Based on Community Competition Law: New Case Law on Direct Applicability of Articles 81 and 82 by Spanish Civil Courts”, *E.C.L.R.*, Volume 23, Issue 4, 2002, p. 163-171, at p. 165.

⁶²³ *BRT v SABAM*, EU:C:1974:25, paragraph 16.

⁶²⁴ As stated, the principle of direct effect was established in the Judgment in *van Gend & Loos*, EU:C:1963:1.

Nevertheless, since the ECJ has declared that Articles 101 and 102 TFEU have direct effect⁶²⁵ and, consequently, national courts are obliged to give effect to those articles, several commentators have submitted that the existence of a final decision by the Commission could not be required for bringing damages claims based on an infringement of the EU competition rules.⁶²⁶

In 2000, the Spanish Supreme Court finally confirmed in *DISA* that the EU competition rules are directly applicable by declaring the disputed contract in question null and void for being incompatible with EU law and by application of Article 1(2) of Competition Law 16/1989 interpreted conforming to EU law. The Court reasoned its ruling by considering that the incompatibility in question was so apparent that the contract could never be granted an individual exemption by the Commission.⁶²⁷ The Supreme Court thus did not require the existence of a previous final decision by the Commission, but applied the EU competition rules directly for the first time.⁶²⁸ Furthermore, the Supreme Court held that a national judge should apply the EU competition rules when it was seized with private lawsuits.⁶²⁹

Although the legal question at issue in *DISA* was the nullity of contracts contrary to Article 101(1) TFEU and not damages based on Article 1902 of the Spanish Civil Code, and it has been submitted that since the only reference in the ruling to possible damages was limited to possible responsibility *in contrahendo* flowing from the specificity of the dispute it cannot be extended to the majority of conducts contrary to Articles 101 and 102 TFEU,⁶³⁰ it is still noteworthy that the Supreme Court did not require a previous

⁶²⁵ *BRT v SABAM*, EU:C:1974:25, paragraph 16.

⁶²⁶ See FERNÁNDEZ, C. and GONZALEZ-ESPEJO, P., “Actions for Damages Based on Community Competition Law: New Case Law on Direct Applicability of Articles 81 and 82 by Spanish Civil Courts”, *E.C.L.R.*, Volume 23, Issue 4, 2002, p. 163-171, at p. 166, and GUTIÉRREZ, A. and GARCÍA SANZ, J., “La indemnización por daños y perjuicios ocasionados por infracciones de las normas de defensa de la competencia: desarrollo en España e hitos recientes”, *Actualidad Jurídica Uría Menéndez*, nº 12, September-December 2005, p. 84-86, at p. 84.

⁶²⁷ Judgment of the Civil Chamber of the Supreme Court No. 540/2000, of June 2nd, 2000.

⁶²⁸ See MONTESA LLOREDA, A. and GIVAJA SANZ, A., “Private actions for damages derived from antitrust law infringements in Spain (Conduit / Telefónica – Antena 3 / Spanish Football League)”, *e-Competitions, Damages*, Vol. I, Nº 469.

⁶²⁹ Judgment of the Civil Chamber of the Supreme Court No. 540/2000, of June 2nd, 2000.

⁶³⁰ See GUTIÉRREZ, A. and MÁRTINEZ SÁNCHEZ, A., “Nuevas perspectivas en la aplicación de las normas de defensa de la competencia por la jurisdicción civil”, *Actualidad Jurídica Uría & Menéndez*, Nº 1/2002, p. 39-55, at p. 53-54.

final administrative decision before declaring the contract in question null and void. As the Supreme Court has confirmed the *DISA* ruling in its rulings in *Mercedes Benz*⁶³¹ and *Petronor*,⁶³² it is settled case law that Spanish courts can directly apply Articles 101 and 102 TFEU. Arguably, the courts must also be able to award damages for infringements of those articles in order to ensure their direct effect and to comply with EU law.⁶³³

The *DISA* ruling consequently introduced a welcome change because the *CAMPESA* ruling not only was in breach with EU law,⁶³⁴ but also constituted a significant obstacle to private enforcement of the competition rules.⁶³⁵ Moreover, Competition Law 15/2007 of July 3rd should contribute to facilitate private antitrust enforcement. The main change brought about by the reform of the Competition Act is that it confers Commercial Courts jurisdiction to directly apply Articles 1 and 2 of the new Competition Act, i.e. the equivalents of Articles 101 and 102 TFEU. This is important, since Commercial Courts can thus also award damages to victims of antitrust violations when the damages claims are based on national competition law even if no final administrative decision finding an infringement exists. As the Commercial Courts were already given jurisdiction to apply Articles 101 and 102 TFEU⁶³⁶ as from September 1st, 2004, the same procedures now apply to damages claims under national and EU competition law.⁶³⁷

A person wishing to claim damages for an infringement of competition rules can base his claim on Article 1902 of the Civil Code, which provides that “[a]ny person who by

⁶³¹ Judgment of the Civil Chamber of the Supreme Court No. 202/2001, of March 2nd, 2001.

⁶³² Judgment of the Civil Chamber of the Supreme Court No. 232/2001, of March 15th, 2001.

⁶³³ It is submitted that even before the *DISA* judgment, in spite of the *CAMPESA* ruling, civil courts would have had jurisdiction to apply the EU competition rules since the ECJ had already held that the competition rules have direct effect, and because of the supremacy of EU law established in *Costa*, 6/64, EU:C:1964:66.

⁶³⁴ See the ECJ Judgments in *van Gend & Loos*, EU:C:1963:1, *Costa*, EU:C:1964:66, and *BRT v SABAM*, EU:C:1974:25.

⁶³⁵ See MONTESA LLOREDA, A. and GIVAJA SANZ, A., “Private actions for damages derived from antitrust law infringements in Spain (Conduit / Telefónica – Antena 3 / Spanish Football League)”, *e-Competitions, Damages*, Vol. I, N° 469.

⁶³⁶ Article 7(2f) of the Organic Law on Judicial Power 8/2003, of July 9th, BOE No. 164, of July 10th, 2003.

⁶³⁷ The Commercial Courts were created by Organic Law on Judicial Power 8/2003 of July 9th, BOE No. 164, of July 10th 2003, which amended the Organic Law on Judicial Power 6/1985 of July 1st, BOE No. 157, of July 2nd 1985).

an act or an omission involving fault or negligence causes damage or harm to another shall compensate the damage caused". Alternatively, it is possible to base the action on Article 15(2) in conjunction with Article 18(5) of the Unfair Competition Law 3/1991 of January 10th.⁶³⁸ According to Article 15(2), any action that constitutes a violation of legal provisions regulating competition is considered as unfair competition. Therefore, a damages action can be brought for infringements of the national as well as the EU competition rules when the unfair act has been carried out with willful misconduct or negligence.⁶³⁹ Standing to bring such an action has any person who participates in the market whose economic interests are directly affected or threatened by the conduct amounting to unfair competition.⁶⁴⁰

As a consequence of *CAMPSA*, there was, in general, little private enforcement of competition rules in Spain. Nonetheless, actions have instead been brought based on the Unfair Competition Law.⁶⁴¹ Moreover, courts have tended to apply competition law as defense against contractual claims in order to declare the contract in question null and void, and apply consequential remedies, for example, in the form of damages. All, except one case have also been business to business claims,⁶⁴² which could indicate that consumers might not have effective remedies in order to obtain compensation. Another interesting fact is that research shows that there has been a significant increase in private litigation in Spain in the period between 2009 and 2012.⁶⁴³

Furthermore, a significant number of damages claims have related to exclusive supply contracts of oil products concluded between gas stations and oil companies. The gas stations considered that the contracts were null and void because they breached Article

⁶³⁸ While Competition Law 16/1989 of July 17th was in force, the courts accepted that damages claims for antitrust damages could be based on Article 5 and/or 15 of the Unfair Competition Law 3/1991 of January 10th. (Article 5 defines unfair competition as conduct objectively contrary to good faith). See CALLOL, P., "The Genesis of a New Legal and Regulatory Framework for Competition Enforcement in Spain", *E.C.L.R.*, Volume 28, Issue 2, 2007, p. 75-83, at p. 83.

⁶³⁹ Article 18(5) of the Unfair Competition Law.

⁶⁴⁰ Article 19 of the Unfair Competition Law.

⁶⁴¹ Article 15(2) and 18(5) of the Unfair Competition Law.

⁶⁴² See MARCOS, P., "Competition Law Private Litigation in Spanish Courts (1999-2012)", *G.C.L.R.*, Issue 4, 2013, p. 167-208, at p. 171.

⁶⁴³ Although the research includes also other private litigation actions than antitrust damages claims, the finding also applies to damages claims. See MARCOS, P., "Competition Law Private Litigation in Spanish Courts (1999-2012)", *G.C.L.R.*, Issue 4, 2013, p. 167-208, at p. 170.

101 TFEU. As some commentators have noted, the diverse outcomes of the Commercial Courts' rulings are striking.⁶⁴⁴ For instance, some of the courts considered the contracts as agency agreements, thus being outside the scope of application of the competition rules, whereas others concluded that the gas stations were not agents, but resellers.⁶⁴⁵ This shows that the knowledge of competition law of some of the judges of the Commercial Courts leaves room for improvement.⁶⁴⁶ Most of the claims have been unsuccessful, and in those cases in which damages have been awarded, the amount of compensation has been left to be determined in the execution of the judgment.⁶⁴⁷

To date, damages for breach of antitrust rules have only been awarded a few times. The first time that a Spanish court awarded damages for an infringement of the competition rules – although it did not specify the quantity of the damages – was in *Eléctrica Curo, S.A. v. Hidroeléctrica de l'Emporda, S.A.*⁶⁴⁸ The plaintiff, Eléctrica Curo, brought an action for damages based on the Competition Law 16/1989 and the Unfair Competition Law 3/1991 after the Spanish Competition Tribunal had found that Hidroeléctrica de l'Emporda had abused its dominant position. The Court of First Instance No. 4 of Figueres hearing the damages claim held, in turn, that the defendant Hidroeléctrica de l'Emporda had committed an act of unfair competition when it gave away for free electrical appliances to each client of its competitor Eléctrica Curo in order to persuade these clients to switch their energy supplier to Hidroeléctrica de l'Emporda. The Court of First Instance ordered Hidroeléctrica de l'Emporda to compensate the damage that it had caused to Eléctrica Curo by capturing 6,3% of its clients by using unfair

⁶⁴⁴ See SANTOS LORENZO, S. and TURNER-KERR, P., “¿En estado de total subdesarrollo? La aplicación privada de las normas de defensa de la competencia en España”, *GJ*, N° 245, September/October 2006, p. 42-56, at p. 45, and FERNÁNDEZ LÓPEZ, J.M., “La reforma del sistema española de defensa de la competencia. Aplicación por los jueces nacionales de la legislación en materia de competencia en el Proyecto de Ley”, Documento de Trabajo, Serie Política de la Competencia, Número 23 / 2007, at p. 15.

⁶⁴⁵ See FERNÁNDEZ LÓPEZ, J.M., “La reforma del sistema española de defensa de la competencia. Aplicación por los jueces nacionales de la legislación en materia de competencia en el Proyecto de Ley”, Documento de Trabajo, Serie Política de la Competencia, Número 23 / 2007, at p. 15.

⁶⁴⁶ See SANTOS LORENZO, S. and TURNER-KERR, P., “¿En estado de total subdesarrollo? La aplicación privada de las normas de defensa de la competencia en España”, *GJ*, N° 245, September/October 2006, p. 42-56, at p. 46.

⁶⁴⁷ See MARCOS, P., “Competition Law Private Litigation in Spanish Courts (1999-2012)”, *G.C.L.R.*, Issue 4, 2013, p. 167-208, at p. 171.

⁶⁴⁸ See GUTIÉRREZ, A. and GARCÍA SANZ, J., “La indemnización por daños y perjuicios ocasionados por infracciones de las normas de defensa de la competencia: desarrollo en España e hitos recientes”, *Actualidad Jurídica Uría Menéndez*, n° 12, September-December 2005, p. 84-86, at p. 85.

practices.⁶⁴⁹ On appeal, the Provincial High Court of Girona upheld the judgment but, referring to the decision of the Competition Tribunal, added that the conduct of Hidroeléctrica de l'Emporda also constituted an abuse of a dominant position, as it breached Article 6(2) of Competition Law 16/1989.⁶⁵⁰

In *Antena 3 v. Professional Football League*,⁶⁵¹ Antena 3 brought a follow-on action for damages after the Spanish Competition Tribunal had found that the Spanish Football League had abused its dominant position by awarding broadcasting rights of football games only to certain companies and by excluding access to two (Antena 3 and Tele 5) of the three new entrants from the market, and had held that the contracts which the Spanish Football League had concluded with other television channels limited competition in breach of Article 1 of Competition Law 16/1989. The decision of the Competition Tribunal had been upheld by the National Court of Appeals as well as the Supreme Court.

The Spanish Football League had called for private bids with respect to certain rights related to professional football games, in particular, the retransmission rights of the competitions organized by it during the following five seasons. Antena 3 presented a bid, but it was rejected. Furthermore, in 1990, the Spanish Football League concluded contracts with the televisions of the Autonomous Regions (*Televisiones Autonómicas*) and with Canal Plus related to the retransmission of football games in television during the following eight years, excluding the access of other entities to those rights.⁶⁵²

In its damages claim, Antena 3 alleged that the conduct of the Spanish Football League impeded it from obtaining advertising revenues deriving from the retransmission of football games, and asked for damages amounting to €34 million. As to the existence of an infringement satisfying the requirement of fault, the Court of First Instance No. 4 of Madrid referred to the decisions of the Competition Tribunal and the courts without conducting its own analysis. Similarly, it held that the causal relationship between the infringement and the damage could be derived from the decision of the Competition

⁶⁴⁹ Judgment of the Court of First Instance No. 4 of Figueres No. 118/1996, of July 7th, 2001.

⁶⁵⁰ Judgment of the Provincial High Court of Girona No. 495/2001, of April 16th, 2002.

⁶⁵¹ Judgment of the Court of First Instance No. 4 of Madrid No. 1438/2004, of June 7th, 2005.

⁶⁵² Judgment of the Court of First Instance No. 4 of Madrid No. 1438/2004, of June 7th, 2005.

Tribunal finding an abuse of dominance, which impeded Antena 3 from acceding to the broadcasting of the games.⁶⁵³ Nevertheless, the fact that the conduct of the Spanish Football League impeded Antena 3 from obtaining broadcasting rights does not seem sufficient to prove that the economic results of the latter were a direct consequence of the lack of broadcasting rights, but the court should have examined this separately.

With regard to the quantity of the damage suffered, the Court of First Instance No. 4 of Madrid started by referring to Article 1106 of the Civil Code, according to which damages do not only include the value of the loss suffered, but also the loss of profit. The Court of First Instance noted that compensation for the loss of profit can only be awarded if a certain objective possibility exists, which flows from the normal course of events and the circumstances particular to the concrete case, and only if the likelihood of profits is very probable in the absence of the events that occurred in the case at issue. The role of the television, and especially the football games, in today's society led the Court of First Instance to conclude that the exclusion of the possibility of Antena 3 of retransmitting football games, in all likelihood, had caused it a loss of profit. Moreover the Court of First Instance relied on the judgment of the National Court of Appeals, pursuant to which Antena 3 was deprived of "*a substantial source of income through advertising*".⁶⁵⁴

In deciding the amount of the damage, the Court of First Instance analyzed expert reports presented by Antena 3 as well as the Spanish Football League. The expert report by Antena 3 based its calculation of the loss suffered on the reasonable price for football, which consists of the price an investor could pay with an expected profitability. It compared, *inter alia*, the difference between the advertising income, which Antena 3 was deprived of, after subtracting the costs that the retransmission of football games entailed, with the income, which Antena 3 actually made on the transmission of alternative programs. The Court of First Instance concluded that the expert report provided by Antena 3 on the estimation of its loss was reasonable and fair, except that it found that losses made during seasons 96/97 and 97/98 should not be taken into account as Antena 3 retransmitted football games once a week during that period. Therefore,

⁶⁵³ Judgment of the Court of First Instance No. 4 of Madrid No. 1438/2004, of June 7th, 2005.

⁶⁵⁴ Judgment of the Court of First Instance No. 4 of Madrid No. 1438/2004, of June 7th, 2005 and Judgment of the National Court of Appeals, of July 17th, 1998.

Antena 3 was only awarded €25.5 million in damages plus interest from the date on which it filed its claim.⁶⁵⁵

However, the Spanish Football League appealed the decision of the Court of First Instance, and the Provincial High Court of Madrid upheld the appeal finding that the proof of damage was insufficient. In particular, the Provincial High Court held that the costs of broadcasting rights of football games employed to prove the damage could not be hypothetical or theoretical, but had to be real. Instead of basing the proof of profitability of football games on purely theoretical propositions, the profitability could have been estimated by comparing the profitability of football games obtained by other channels which were awarded contracts and broadcasted those games, with the profitability of the alternative programs of Antena 3 during that period. Consequently, the Court rejected the claim of Antena 3 in its entirety, and absolved the Spanish Football League of all claims.⁶⁵⁶

In *Conduit Europe, S.A. v. Telefónica de España S.A.U.*⁶⁵⁷ damages were awarded for the first time in Spain for a breach of the EU antitrust rules, namely Article 102 TFEU.⁶⁵⁸ Conduit, an Irish communication services provider, brought an action for damages based on Article 18(5) of the Unfair Competition Law claiming that Telefónica had infringed Article 15(2) of the Unfair Competition Law by supplying defective or incomplete information to Conduit on the telephone numbers of its subscribers. The Commercial Court upheld the claim that Telefónica had abused its dominant position because the information provided to Conduit was not of the same quality or as complete as the information that Telefónica provided to its own directory inquiry services. As the information was essential for gaining access to the related market for subscriber directory inquiries, the conduct of Telefónica made it difficult for Conduit to enter that

⁶⁵⁵ Judgment of the Court of First Instance No. 4 of Madrid No. 1438/2004, of June 7th, 2005.

⁶⁵⁶ Judgment of the Provincial High Court of Madrid No. 130/2006, of December 18th, 2006.

⁶⁵⁷ Judgment of Commercial Court No. 5 of Madrid No. 85/2005, of November 11th, 2005, which was upheld by the Provincial High Court of Madrid in its judgment No. 73/2006, of May 25th, 2006.

⁶⁵⁸ See MONTESA LLOREDA, A. and GIVAJA SANZ, A., “Private actions for damages derived from antitrust law infringements in Spain (Conduit / Telefónica – Antena 3 / Spanish Football League)”, *e-Competitions, Damages*, Vol. I, N° 469.

market. Furthermore, Conduit was obligated to pay for alternative sources of information and, consequently, it suffered additional costs.⁶⁵⁹

As to the quantity of the damage caused to Conduit, Conduit provided the Commercial Court with an econometric analysis of what its market share would have been were it not for the abuse of Telefónica. Since it was impossible to recreate the market situation in Spain, such as it was when the abuse occurred, Conduit looked at its market performance in the UK market where the competition conditions were similar to what they had been when Conduit launched its services in Spain. As Conduit was competing in the United Kingdom without being harmed by any abusive conduct, the Commercial Court accepted this method for calculating the damage. But it noted that other factors, together with that abuse, might have contributed to the loss of Conduit's market share, and therefore no loss of profit could be awarded. Consequently, the Commercial Court ordered Telefónica to pay compensation of €639,000 to Conduit for the additional costs that the latter had paid for alternative sources of data as well as for treatment of data. Telefónica appealed the decision, but the Provincial High Court of Madrid rejected its appeal.⁶⁶⁰ This case exemplifies the difficulty in obtaining compensation for loss of profit in Spain which, arguably, often constitutes the main type of damages in antitrust cases.

The Provincial High Court of Valladolid reached a different conclusion regarding the quantification of damages in the *Sugar Cartel*.⁶⁶¹ This was a follow-on damages claim which was brought once the decision of the Competition Tribunal finding that several sugar producers had operated a price-fixing cartel between 1995 and 1996 had become final.⁶⁶² A number of food producers which had suffered harm as a result of the cartel sought damages from ACOR before the Court of First Instance, but their claim was rejected.⁶⁶³ The claimants appealed the decision, and on appeal the Provincial High Court of Valladolid ruled in their favor and awarded damages to them. It held that the assessment of the damage caused was difficult, but despite this, it was possible to

⁶⁵⁹ Judgment of Commercial Court No. 5 of Madrid No. 85/2005, of November 11th, 2005.

⁶⁶⁰ Judgment of the Provincial High Court of Madrid No. 73/2006, of May 25th, 2006.

⁶⁶¹ Judgment of the Provincial High Court of Valladolid No. 214/2009 of October 9th, 2009.

⁶⁶² Judgment of the Competition Tribunal of April 15th, 1999 (426/1998).

⁶⁶³ Judgment of the Court of First Instance No. 11 of Valladolid No. 571 /2007 of February 20th, 2009.

consider the quantification of damages by the expert testifying on behalf of the claimants as appropriate according to which the harm suffered by the claimants was the difference between the price of sugar actually paid by the claimants to ACOR and the price they should have paid under normal competitive market conditions.⁶⁶⁴ The ruling was upheld by the Supreme Court.⁶⁶⁵

Related to the same *Sugar Cartel*, some confectionary manufacturers also brought an action for damages for loss that they had suffered from the price-fixing agreement against another cartel, Ebro Foods. The Court of First Instance of Madrid, taking into consideration the discrepancies between the economic evidence about the harm caused presented by the parties' experts, partially upheld their claim.⁶⁶⁶ However, the claim was dismissed on appeal as the Provincial High Court of Madrid considered that the prices resulted from individual negotiations between Ebro Foods and each of the applicants.⁶⁶⁷ This ruling was quashed by the Supreme Court, which found that the facts of the case had already been established in the public enforcement proceedings and, therefore, the principle of *res judicata* impeded the Provincial High Court of Madrid from assessing the facts differently.⁶⁶⁸ In analyzing the passing-on defense invoked by Ebro Foods, the Court concluded that the defendant had not succeeded in proving that the price increase applied by the direct purchasers had not caused them any loss in the form of decreased sales. As the defendant had not adduced evidence of the price increase having been fully passed on to their customers, the injured parties obtained €4.1million in damages.⁶⁶⁹ As these cases demonstrate, the judges are not necessary ready to assess complex economic reasoning, which renders private enforcement more difficult.⁶⁷⁰

⁶⁶⁴ Judgment of the Provincial High Court of Valladolid No. 214/2009 of October 9th, 2009.

⁶⁶⁵ Judgment of the Supreme Court No. 5462/2012 of June 8th, 2012.

⁶⁶⁶ Judgment of the Court of First Instance No. 50 of Madrid No. 59/2010 of March 1st, 2010.

⁶⁶⁷ Judgment of the Provincial High Court of Madrid No. 370/2011 of October 3rd, 2011.

⁶⁶⁸ Judgment of the Supreme Court No. 65172013 of November 7th, 2013. The coherence between public and private enforcement relating to the same conduct is necessary in order to ensure a minimum right to effective judicial protection. See ORDÓÑEZ SOLÍS, D., "La acción de indemnización en la aplicación judicial privada del Derecho europeo de la competencia" *Noticias de la Unión Europea*, 330, July 2012, p. 3-16, at p. 16.

⁶⁶⁹ Judgment of the Supreme Court No. 65172013 of November 7th, 2013.

⁶⁷⁰ See DÍEZ, F., "Recovery of Damages in Antitrust Enforcement: the Next Important Topic? Analysis of Recent Case Law?" in VELASCO SAN PEDRO L.A, ALONSO LEDESMA C., ECHEBARRÍA SÁENZ

The most recent ruling relating to an antitrust damages action in Spain was decided in May, 2014 in relation to the *Decennial Insurance Cartel*. The Commercial Court No. 12 ordered several insurance companies and a reinsurance company to pay damages exceeding €3.5 million for boycotting another insurance company due to the *Decennial Insurance Cartel*.⁶⁷¹ In 2009, the Spanish Competition Authority CNC had imposed a fine on five insurance companies and reinsurers for their participation in a cartel which prevented the insurance company Mussat from offering cheaper insurance contracts to customers.⁶⁷² However, this ruling was subsequently overruled by the National Court of Appeals, which found that the existence of an anti-competitive agreement on commercial premiums had not been proven.⁶⁷³ An appeal is currently pending before the Spanish Supreme Court. The issue of whether there has been a cartel is therefore questionable. Most noteworthy of the ruling is the refusal to award damages for loss of profits. Instead, the Court only awarded actual damages.⁶⁷⁴ Once again, this judgment shows the difficulty in obtaining compensation for this important type of harm which undertakings that are victims of an antitrust violation often suffer.

3.5.2. Main Obstacles to Private Enforcement

The main obstacles to private enforcement in Spain are similar to those that exist in other Member States. Access to evidence is, arguably, the biggest obstacle for competitors, undertakings that are active at other levels in the distribution chain, and consumers.⁶⁷⁵ These potential claimants can thus mainly bring follow-on actions once the competition authorities have established the existence of an anti-competitive agreement or conduct, whereas a co-contractor might be able to bring a stand-alone action, since it has participated in the illegal practice and is likely to have at least some

J.A., HERRERO SUÁREZ C., and GUTIÉRREZ GILSANZ J. (eds.), *Private Enforcement of Competition Law*, Lex Nova, Valladolid, 2011, p. 215-228, at p. 221-228.

⁶⁷¹ Judgment of the Commercial Court of Madrid No. 12 of May 9th, 2014.

⁶⁷² Decision of the National Competition Commission of November 12th, 2009.

⁶⁷³ Judgment of the National Court of Appeals of December 18th, 2012.

⁶⁷⁴ Judgment of the Commercial Court No. 12 of May 9th, 2014.

⁶⁷⁵ See LESKINEN, C., “The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 72-73.

evidence of the infringement. It is also feasible that actions for damages based on abuse of a dominant position or a vertical restraint might in some cases be brought as stand-alone actions.

As to the burden of proof, the party invoking a fact and claiming a benefit based thereon has to prove the fact in question.⁶⁷⁶ The task of adducing evidence is eased thanks to the possibility under Article 328 of Civil Procedure Law 1/2000 of requesting the production by other parties of documents not in the requesting party's possession, which relate to the issue in question in the proceedings or to the strength of the evidence.⁶⁷⁷ However, even so, the requesting party should still indicate as accurately as possible the content of the requested document so that the document can be identified.⁶⁷⁸ Consequently, it might still be impossible for potential claimants to take full advantage of this possibility.⁶⁷⁹ Furthermore, it could be a risky strategy to rely on Article 328 to obtain documents, because those documents could turn out not to be favorable to the claimant's case. Even worse, the claimant would not be able to object to their use in the proceedings.

Alternatively, if the claimant brings its action based on Article 15(2) in conjunction with Article 18(5) of the Unfair Competition Law 3/1991, it can, pursuant to Article 24 of that law, request the judge that proceedings be held to ascertain those facts which are objectively indispensable for preparing the judgment.

Another difficulty is the requirement that the claimant must be able to quantify the actual loss suffered because damages are only awarded as compensation for the real loss suffered by the injured party.⁶⁸⁰ This is particularly challenging in a situation involving several intermediaries, and the purchaser that has paid an overcharge for a product or a service has passed that overcharge (or a part of it) on to other levels in the distribution

⁶⁷⁶ Article 217 of Law 1/2000 on Civil Procedure of January 7th, BOE No. 7, of January 8th 2000.

⁶⁷⁷ Article 329 of Law 1/2000 on Civil Procedure.

⁶⁷⁸ Article 328(2) of Law 1/2000 on Civil Procedure.

⁶⁷⁹ See LESKINEN, C., "*The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland*" in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), "*Derecho de la competencia europeo y español. Volumen VIII*", Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 57.

⁶⁸⁰ Article 1106 of the Civil Code.

chain, since the amount that has been passed on must be taken into account and reduced from the amount of compensation awarded to the purchaser.

But also in other cases, the quantification of damages is difficult, since the criteria for calculating damages are vague and uncertain.⁶⁸¹ In particular, the loss of profit may only be compensated if the claimant can demonstrate the damage with a certain degree of likelihood.⁶⁸² As the economic analysis needed in competition cases tends to be complex, it is difficult to precisely quantify damages.⁶⁸³ Moreover, the courts in Spain have in general been unwilling to award damages for the loss of profit in antitrust damages cases. Instead, they tend only to order the general harm to be compensated as have been seen, for instance, in the cases *Conduit* and *Antena 3*.

Furthermore, as the party which loses the case will normally be obliged to pay both parties' costs⁶⁸⁴ since the "loser pays" rule normally applies, potential claimants might be dissuaded from bringing damages claims due to the risk of losing the case. This risk is more pronounced when the incentive to bring an action is not very big in the first place, such as when the loss suffered is small, since a successful party will at best only be able to recover the economic loss that it has suffered,⁶⁸⁵ and not, for example, punitive damages. Only if the court finds that the case raised serious legal or factual doubts in the light of case law in similar cases, may it decide to depart from the "loser pays" principle. In case the claim is only partly successful, each party bears its own costs and shares the common costs incurred, except if one of them has acted recklessly.⁶⁸⁶

⁶⁸¹ See HITCHINGS, P., "The Conduit Case" in ORTIZ BLANCO, L. and ENTRENA ROVERS, J. (eds.), *Derecho de la competencia europeo y español. Curso de iniciación, Volumen VII*, Dykinson, S.L., Madrid, 2007, p. 157-176, at p. 174.

⁶⁸² Judgment of the Civil Chamber of the Supreme Court No. 896/2002, of September 26th, 2002, and judgment of the Civil Chamber of the Supreme Court No. 727/2003, of July 14th, 2003.

⁶⁸³ See HITCHINGS, P., "The Conduit Case" in ORTIZ BLANCO, L. and ENTRENA ROVERS, J. (eds.), *Derecho de la competencia europeo y español. Curso de iniciación, Volumen VII*, Dykinson, S.L., Madrid, 2007, p. 157-176, at p. 174.

⁶⁸⁴ Article 394 of Law 1/2000 on Civil Procedure. However, if the court finds that the claim was rejected because the case presented serious doubts of facts and law, the claimant is liberated from paying the costs.

⁶⁸⁵ See LESKINEN, C., "The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland" in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76, at p. 68.

⁶⁸⁶ Article 394 of Law 1/2000 on Civil Procedure.

There is also a limitation on the amount which the losing party must pay for the fees of lawyers and other professionals; the maximum amount is a third of the value of the action, unless the party has acted recklessly.⁶⁸⁷ The actual costs for court proceedings depend on the specific characteristics of the case as well as the complexity of the issues involved.⁶⁸⁸ But as a minimum, the claimant must pay a judicial fee with the exception of non-profit organizations, legal entities (partly or wholly) exempted from company tax, individuals or small companies.⁶⁸⁹

As to lawyers' fees, contingency fees are allowed. This was clarified by a judgment of the Spanish Supreme Court in November 2008.⁶⁹⁰ The judgment departed from what the General Council of the Spanish Bar had decided earlier. Until this Supreme Court Judgment, the Deontology Code of the Spanish Bar prohibited agreements between lawyer and client by which they agreed that the lawyer would only charge for a part of the awards granted as a result of the litigation. Nevertheless, the lawyer and client could agree that the lawyer would charge a part of the amount recovered in order to increase the fee so as to cover the costs incurred by the lawyer.⁶⁹¹ In its ruling, the Supreme Court rejected the argument made by the General Council of the Spanish Bar that the prohibition of contingency fees was a measure of general interest aiming to guarantee the independence of lawyers and found that if that was the real aim of the prohibition, it would also have prohibited lawyers from charging a part of the amount recovered in order to increase their fee. Accordingly, the Court held that the prohibition of contingency fees resulted in fixing minimum prices for lawyers' fees.⁶⁹²

The existing collective actions do also not appear to be sufficiently effective to ensure the compensation of consumers in particular. In fact, to date, consumers have not been

⁶⁸⁷ *Idem.*

⁶⁸⁸ See FOLGUERA CRESPO, J. and MARTÍNEZ CORRAL, B., "Spanish National Report on 'The judicial application of European competition law' for the FIDE Congress Madrid 2010", at p. 33.

⁶⁸⁹ Article 35 of Law 53/2002 of December 30th, on Fiscal, Administrative and Social Measures.

⁶⁹⁰ Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

⁶⁹¹ See VÉRGEZ MUÑOZ, C. and PÉREZ GUERRA, M.A., "Comentario a la Sentencia del Tribunal Supremo de 4 de noviembre de 2008, las implicaciones de la *cuota litis* desde la perspectiva del Derecho de la competencia", *Gazeta Jurídica de la Unión Europea y de la Competencia*, March/April 2009, No 8, p. 107-115, at p. 107.

⁶⁹² Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

awarded any damages for antitrust violations and, as stated above, to date only one collective action for antitrust damages has been brought.

Under Article 11 of Civil Procedure Law 1/2000, consumer and user associations can bring actions to protect the rights and interests of their members and the association as well as the general interests of consumers and users. Article 11 distinguishes between the situation where the members of the group of consumers and users having suffered loss is fully identifiable or easy to identify, and where there is a plurality of consumers or users, or it is impossible or difficult to identify the group that has suffered harm. When the members of the group are identified or are easily identifiable, both consumer and user associations and legally formed entities whose purpose is the defense or protection of consumers and users as well as the affected groups are entitled to bring actions for damages. However, when the group consists of consumers or users who are not identified or are difficult to identify, only consumer and user associations which represent general consumer interests are entitled to bring damages actions.

Only consumer and user associations, which belong to the Council of Consumers and Users (Consejo de Consumidores y Usuarios) may bring collective actions for damages. The most representative consumer and user associations, taking into account their territorial scope of activity, number of members, performance in the field of consumer protection, and programs of activity to be developed, are admitted to the Council of Consumers and Users.⁶⁹³

It is also possible for other interested parties, who were not original parties to the proceedings, to be admitted as claimants in the proceedings as long as they prove that they have a direct and lawful interest in the outcome of the proceedings. In particular, any consumer can intervene in any proceedings brought by the entities legally entitled to defend their interests.⁶⁹⁴ There are two ways of informing potential claimants about an action. If the injured parties are identified or can easily be identified, the claimant or claimants must give prior notice of the filing of the claim to all those parties that may be

⁶⁹³ Articles 22 and 22 *bis* of the Law for the improvement of consumer and user protection 44/2006, of December 29th.

⁶⁹⁴ Article 13(1) of the Civil Procedure Law 1/2000.

interested in joining the action.⁶⁹⁵ If they are not identified or easily identified, the advertisement of the claim will stay the proceedings during a period not exceeding two months, decided in each case depending on the circumstances and complexity of the facts and the difficulty in identifying and locating the injured parties.⁶⁹⁶ The advertisement of the claim must be made in the media available in the territory where the rights or interests were injured.⁶⁹⁷ As the Civil Procedure Law does not provide how this advertisement shall be made, it is for the court to decide in each case.⁶⁹⁸ Any consumer who has responded to the advertisement within the time limit decided by the court will become party to the proceedings.⁶⁹⁹

Any award following a collective or class action is made in respect of each individual claimant, not the whole group. As a consequence, after a favorable judgment has been given, each claimant must apply to the court in order to be recognized as a member of the group and for individual damages to be quantified.⁷⁰⁰ As Article 11 of Civil Procedure Law 1/2000 only concerns consumers and users, competitors, and undertakings active at different levels in the production or distribution chain cannot rely on that provision in order to bring a collective action.⁷⁰¹

The collective action provided for by the Civil Procedure Law is usually used in large-scale consumer claims that affect a significant number of consumers, but it is also applied to many consumer contracts. Since the action can be brought to claim compensation for damages caused by the consumption or use of products and to determine the contractual and non-contractual liability of the professional,⁷⁰² it can also

⁶⁹⁵ Article 15(2) of the Civil Procedure Law 1/2000.

⁶⁹⁶ Article 15(3) of the Civil Procedure Law 1/2000.

⁶⁹⁷ Article 15(1) of the Civil Procedure Law 1/2000.

⁶⁹⁸ See TORRES, E., "In unity, is there strength? Representative claims – overview of some European developments", *I.C.C.L.R.*, 12(6), 2001, p. 178-182, at p. 181.

⁶⁹⁹ Article 15(3) of Civil Procedure Law 1/2000.

⁷⁰⁰ See National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.

⁷⁰¹ See FERNÁNDEZ, C., "La eficacia real del derecho de la competencia: la indemnización de los daños causados" in MARTÍNEZ LAGE, S. and PETITBÒ JUAN, A. (eds.), *La modernización del derecho de la competencia en España y en la Unión Europea*, Fundación Rafel del Pino, Marcial Pons, Ediciones jurídicas y sociales, S.A., Madrid, 2005, p. 171-185, at p. 184.

⁷⁰² See Spain – National Report, November 15th, 2006, prepared for the Consumer Redress Study, at p. 16.

be used to bring a collective antitrust damages action.⁷⁰³ It has been suggested that the affected consumers could be identified, for instance, by the purchase receipts.⁷⁰⁴

Nevertheless, to date, no successful collective action for damages based on an antitrust violation has been brought in Spain. An attempt was made by Ausbanc Consumo which brought a collective antitrust damages action against Telefónica España in October 2007. It was based on the decision by the Commission to impose a fine on Telefónica for the margin squeeze on ADSL prices charged to competing wholesale companies.⁷⁰⁵ Ausbanc sought compensation in order to indemnify users for the overcharge for broadband Internet access. It was granted leave to proceed in respect of the action by Commercial Court No. 4 of Madrid,⁷⁰⁶ but the case is still pending.

One of the main problems with the Spanish style collective action is that it is limited to consumers. Also competitors and customers other than consumers, small and medium-sized enterprises in particular, may lack incentives to bring an individual stand-alone damages action. Moreover, the claimant must apply to the court in order to be recognized as a member of the group and for individual damages to be quantified.⁷⁰⁷ The former requirement could discourage consumers from opting in, since they must be active as opposed to an opt-out class action, in which the judgment will be binding on all class members, if they have not opted out. If their claim is very small, some claimants might not bother to take the steps necessary to join the action. The need to apply to the court so as to quantify damages might, in turn, constitute a supplementary hurdle for the individual claimant to actually obtain compensation for the loss that it has

⁷⁰³ See ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA, “Observations to the Green Paper on Damages actions for breach of the EC antitrust rules, at p. 8.

⁷⁰⁴ See FERNÁNDEZ, C., “*La eficacia real del derecho de la competencia: la indemnización de los daños causados*” in MARTÍNEZ LAGE, S. and PETITBÒ JUAN, A. (eds.), *La modernización del derecho de la competencia en España y en la Unión Europea*, Fundación Rafel del Pino, Marcial Pons, Ediciones jurídicas y sociales, S.A., Madrid, 2005, p. 171-185, at p. 184.

⁷⁰⁵ Commission Decision of July 4th, 2007 in Case COMP/38.784 – *Wanadoo España v. Telefónica*.

⁷⁰⁶ See “La Audiencia Provincial de Madrid ordena reanudar el juicio contra Telefónica, demandada por 458 millones”, available at: <http://www.ausbanc.com/index0.htm>.

⁷⁰⁷ See National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.

suffered, as quantum is often difficult to calculate, as the review of Spanish antitrust case law has shown.⁷⁰⁸

Finally, the principle of *res judicata* is partly interpreted differently in Spain than in other countries, especially Common Law jurisdictions, regarding the possibility of bringing individual actions after a representative action has been brought. Consequently, although *res judicata* normally affects the parties to the proceedings, Article 222 of the Civil Procedure Law provides that in collective actions *res judicata* also affects individuals, who are not parties to the dispute even though they are holders of the rights that grant legal standing to the parties. This means that in Spain, the *res judicata* effect also extends to parties who have not participated in the collective action brought by an association, which defends their interests. Thus, in Spain consumers would be barred from bringing an individual action, if a consumer association has already brought a collective action.⁷⁰⁹

However, in general, the legal doctrine outside Spain seems to consider that the principle of *res judicata* can only be applied to impede those consumers bringing actions who joined the collective action brought by the association because in that case there would be an identity of parties. On the contrary, a collective action could not bar those individuals who did not participate in that action from bringing claims individually. This right to individual action would also be in compliance with the right to due process of law that is recognized by the constitutions of the Member States.⁷¹⁰ In contrast, the extension of the *res judicata* effect by Article 222 of the Civil Procedure Law to all consumers whose interests are defended by a consumer association appears to be incompatible with the constitutional principle of right to due process of law, unless the consumers are allowed to bring an individual action instead of the consumer association bringing a collective action on their behalf.

⁷⁰⁸ See e.g. the Judgment of the Provincial High Court of Madrid No. 130/2006, of December 18th, 2006 and the Judgment of Commercial Court No. 5 of Madrid No. 85/2005, of November 11th, 2005.

⁷⁰⁹ See GARCÍA CACHAFEIRO, F., “Las asociaciones de consumidores ante el abuso de posición dominante de la Unión Europea”, *Cuadernos Europeos de Deusto*, No. 38/2008, p. 155-175, at p. 161.

⁷¹⁰ *Ibid.*, at p. 160-161.

In assessing antitrust damages actions in Spain, on the positive side, the creation of the Commercial Courts allows for more expertise (at least over time) in the application of the competition rules. Moreover, it is welcome that also under national law, these courts may apply directly both Articles 101 and 102 TFEU and their Spanish equivalents, and that the same procedures apply in both cases. The possibility of bringing stand-alone damages actions reduces the time of proceedings in those cases where the victims have sufficient evidence of the infringement, or can gain access to such evidence, although it is acknowledged that not all types of infringements may realistically be brought without an infringement decision by the competition authorities (most notably this limitation would apply to cartel cases).

Nevertheless, the rules governing the bringing of antitrust damages actions still leave room for improvement. For instance, the burden of proof is high and the assessment of evidence is often difficult, as has been seen regarding the quantification of damages. In addition, the access to evidence is currently rather burdensome, and the existing collective actions have proved insufficient in ensuring redress of consumers. These issues are likely to explain why damages claims have not been successful very often.

3.6. Sweden

3.6.1. General Overview

In Sweden, the Competition Act has included an express provision about a right to damages for an antitrust violation since 1993.⁷¹¹ Initially this right was limited to companies and contracting parties. An action could also only be brought based on infringements of the national competition rules. By amendments made to the Competition Act in 2005, *inter alia*, the right to bring antitrust damages action was expanded to all persons and entities having suffered losses. Therefore, today standing is in line with EU law.

Under the current Competition Act (2008:579), the right to damages can be based on an infringement of the Swedish as well as the EU competition rules.⁷¹² The Swedish

⁷¹¹ Competition Act (1993:20).

⁷¹² Chapter 3, Section 25 of the Competition Act (2008:579).

competition rules⁷¹³ prohibiting anti-competitive agreements or concerted practices and the abuse of a dominant position are virtually the same as Articles 101 and 102 TFEU. Anybody who has suffered harm as a result of such an antitrust violation may seek damages, provided that the violation was committed intentionally or negligently.⁷¹⁴ This means that some kind of fault is required. Negligence is usually considered to exist based on the infringing act itself, especially in cases where the assessment from a competition law standpoint is comparatively clear. In addition, there must also be an adequate causal relationship between the violation and the harm caused by it.⁷¹⁵ The limitation period for bringing an antitrust damages action is ten years from the day on which the damage occurred.⁷¹⁶

Antitrust damages actions are usually brought before the District Courts⁷¹⁷ either where the defendant resides or has its seat, or where the infringement took place or the damage occurred. If the place where the infringement took place and the damage occurred in different places, an action can be brought before the competent court of either place.⁷¹⁸ Group actions can be brought before the competent district courts in each county designated by the Government.⁷¹⁹

It is also possible to decide a damages action together with an action for the imposition of fines if the Stockholm District Court decides that it is expedient to hear the two cases together. In other words, if the Competition Authority has brought a case in order to establish an infringement of the competition rules and a damages claim relates to that infringement, they can be tried together before the Stockholm District Court.⁷²⁰ Moreover, private parties who wish to bring a damages claim also have a general right

⁷¹³ Chapter 2, Sections 1 and 7 of the Competition Act (2008:579).

⁷¹⁴ Chapter 3, Section 25 of the Competition Act (2008:579).

⁷¹⁵ See BERNITZ, *Svensk och europeisk marknadsrätt 1. Konkurrensrätten och marknadsekonomins rättsliga grundvalar*, Third Edition, Visby, 2011, at p. 249.

⁷¹⁶ Act Modifying the Competition Act (2008:579), SFS 2010:642. This is an important increase compared to the 5-year limitation period that was in force under the 1993 Competition Act (1993:20) and which still applies to damages claims that have arisen before August 1st, 2005.

⁷¹⁷ See BERNITZ, *Svensk och europeisk marknadsrätt 1. Konkurrensrätten och marknadsekonomins rättsliga grundvalar*, Third Edition, Visby, 2011, at p. 249, n. 22.

⁷¹⁸ Chapter 10, Sections 1 and 8 of the Code of Judicial Procedure (1942:740).

⁷¹⁹ Section 3 of the Group Proceedings Act (2002:599).

⁷²⁰ Chapter 8, Section of the Competition Act (2008:579).

to intervene in a related public enforcement action if they can demonstrate that that the matter will affect their legal rights or obligations.⁷²¹

In addition, the Stockholm District Court is always competent to hear any antitrust damages action under the specific forum provision in the Competition Act.⁷²² Appeals are heard by Courts of Appeal, and their decisions may be appealed to the Supreme Court. Finally, arbitration tribunals may also consider the civil consequences of competition law between parties.⁷²³

The aim of the damages award is both to compensate and deter. Purely economic damage may be compensated, e.g. encroachment on economic activity and loss of turnover and profit.⁷²⁴ The right to compensation also includes interest pursuant to the Interest Act.⁷²⁵ The damages awarded should be sufficiently significant so as to compensate for the damages caused.⁷²⁶ The amount must correspond to full compensation and may not exceed this.⁷²⁷ Apart from that, courts may use any method for calculating damages.⁷²⁸ If the claimant has contributed, by fault or negligence, to its injury, damages can be reduced.⁷²⁹ In case of difficulties in proving the quantity of the harm, courts may assess its quantity under Chapter 35, Section 5 of the Code on Judicial Procedure. Such an assessment is also allowed if adducing the evidence would entail costs or inconvenience not being reasonable in relation to the size of the damage, and the claimed compensation concerns a small amount.⁷³⁰

⁷²¹ Chapter 14, Section 9 of the Code of Judicial Procedure (1942:740).

⁷²² Chapter 3, Section 26 of the Competition Act (2008:579).

⁷²³ Section 1 of the Arbitration Proceedings Act (1999:116)).

⁷²⁴ See BERNITZ, *Svensk och europeisk marknadsrätt 1. Konkurrensrätten och marknadsekonomin rättsliga grundvalar*, Third Edition, Visby, 2011, at p. 250.

⁷²⁵ Interest Act (1975:635).

⁷²⁶ See BERNITZ, *Svensk och europeisk marknadsrätt 1. Konkurrensrätten och marknadsekonomin rättsliga grundvalar*, Third Edition, Visby, 2011, at p. 250.

⁷²⁷ See HENRIKSSON, L., AHRC Project, “*Private Enforcement and Consumer Redress in Sweden 1999-2012*”, at p. 2.

⁷²⁸ See ÖBERG, U. and LUNDSTRÖM, J., “Swedish National Report on ‘The judicial application of European competition law’ for the FIDE 2010 Congress Madrid”.

⁷²⁹ Chapter 6, Section 1, paragraph 2 of the Tort Liability Act (1972:207).

⁷³⁰ Chapter 35, Section 5 of the Code on Judicial Procedure.

However, damages actions are still scarce, although some cases have been settled.⁷³¹ The first case in which an antitrust damages action resulted in damages was *Europe Investor Direct et al. v. VPC* (currently Euroclear). VPC is a central securities depository and has a monopoly on information on the registers of shares in Swedish limited companies. From the end of 1998 during a period of approximately five years, VPC refused to supply this information to Europe Investor Direct and the other claimants. The Stockholm District Court held that VPC had abused its dominant position due to this refusal and there was no objective justification for it. As a result, it was sentenced to pay approximately SEK 3.9 million in damages.⁷³² Upon appeal, the Svea Court of Appeal upheld the ruling of the Stockholm District Court as to the existence of a dominant position, but found that the abuse had already terminated in October 2001. Therefore, it assessed that the overall damages to be compensated were SEK 1.9 million.⁷³³ The Supreme Court did not grant leave to appeal.

To date, antitrust damages actions have been brought in cartel cases or cases alleging the abuse of a dominant position.⁷³⁴ Overall, antitrust damages actions have been scarce, especially in the 1990's. Before 1993, cartels were allowed provided that they were entered in the national cartel register, which explains the lack of damages claims. Also, only few antitrust cases have directly involved consumers either as customers to an undertaking abusing its dominant position, or as direct customers of undertakings participating in cartels.⁷³⁵ Arguably, consumers would in other cases face the accentuated difficulties of third parties bringing antitrust damages actions. Other possible reasons for the scarcity of damages claims suggested are a general low tendency to go to court and reluctance to bring law suits.⁷³⁶

⁷³¹ See GLADER, M. and ALSTERGREN, P., "Sweden" in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 395.

⁷³² Joined Cases T 32799-05 and T 34227-05, *Europe Investor Direct AB et al. v. VPC AB*, Judgment of November 20th, 2008.

⁷³³ Case T 10012-08, *Euroclear v. Europe Investor Direct AB et al.*, Judgment of January 19th, 2011.

⁷³⁴ See GLADER, M. and ALSTERGREN, P., "Sweden" in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 397.

⁷³⁵ See HENRIKSSON, L., AHRC Project, "Private Enforcement and Consumer Redress in Sweden 1999-2012", at p. 7-8.

⁷³⁶ *Ibid.*, at p. 7.

Nevertheless, in the past few years several damages actions based on cartel violations have been brought. For instance, a number of local communities brought follow-on actions after the Market Court had given its final ruling in the Asphalt cartel case. But the District Court removed these cases and the claims were settled.⁷³⁷ In addition, some damages claims have been brought on the basis of abuse of a dominant position. For example, the petroleum company Preem brought an antitrust damages action against a port operator in the city of Gävle as it had allegedly been subject to price discrimination since it was charged a higher tariff than other companies in Gävle harbor. But on May 2012, in the Stockholm District Court dismissed the action since Preem was not active on the same market as those companies, and had not shown that it had suffered a competitive disadvantage.⁷³⁸ Two follow-on actions have also been brought against TeliaSonera claiming damages for harm resulting from the abuse of TeliaSonera's dominant position between 2001 and 2003 by applying a margin-squeeze in the Swedish ADSL market.⁷³⁹ Because these cases, it is to be expected that private enforcement is on the rise in Sweden.⁷⁴⁰

However, no actions by consumers or collective antitrust damages actions been brought to date,⁷⁴¹ although the Swedish legislation provides for a comparatively extensive group action. The group action was introduced by the Group Proceedings Act 2002:599, which entered into force on January 1st, 2003. The Group Proceedings Act provides for three different forms of group actions: a private group action, an organization action or a public group action.⁷⁴² For the purpose of this thesis, the private group action is of

⁷³⁷ See HENRIKSSON, L., AHRC Project, "Private Enforcement and Consumer Redress in Sweden 1999-2012", at p. 17.

⁷³⁸ Case T 5995-09, *Preem Aktiebolag v. Gävle Hamn*, Judgment of May 12th, 2012.

⁷³⁹ See HANSSON, P. and KARLSSON, K., "Sweden: Overview", *The European Antitrust Review*, 2014, available at <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2122/sweden-overview/>.

⁷⁴⁰ See GLADER, M. and ALSTERGREN, P., "Sweden" in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 395.

⁷⁴¹ See HENRIKSSON, L., AHCR Project, "Private Enforcement and Consumer Redress in Sweden 1999-2012", at p. 7.

⁷⁴² Section 1 of the Group Proceedings Act (2002:599).

most interest in that it allows a natural person or a legal entity to bring a group action on behalf of other persons (i.e. group members), who are not parties to the case.⁷⁴³

The private group action is based on an opt-in model, i.e. only group members who, within the period determined by the court, have given notice in writing about their wish to join the group action will be considered group members.⁷⁴⁴ Once the group member has notified its wish to opt in and the period for opting in has expired, the group member can no longer withdraw its notice. In order to withdraw his notice, the group member must intervene in the proceeding.⁷⁴⁵

The court must notify the group members about the group action in an appropriate manner.⁷⁴⁶ In general, the service of process should be issued if the notification contains an obligation for group members in the proceeding, and the omission of the obligation is penalized somehow. If the potential group members are unknown, the notification is done by the means of a public notice. This is also possible if a large group shall be notified and it would entail more costs and efforts than what is reasonable taking into account the aim of the service of process to hand the document to each of them.⁷⁴⁷

There are special preconditions for bringing a group action. The circumstances on which the action is based must be common or similar for the claims of the entire group. Moreover, a group action must not be inappropriate due to the fact that the grounds of some claims of the group members differ substantially from other claims. It must also not be possible for the group members to pursue the larger part of their claims equally well by individual actions than by a group action. The group, taking into consideration

⁷⁴³ Sections 1 and 4 of the Group Proceedings Act (2002:599). According to Section 5, an organization action may in turn be brought by a not-for-profit association protecting consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utility offered by the business operator to consumers. The public group action may be brought by an authority which is suitable to represent the members of the group. Such authorities are decided by the Government (Section 6 of the Group Proceedings Act).

⁷⁴⁴ Section 14 of the Group Proceedings Act (2002:599).

⁷⁴⁵ THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, DS 2008:74, October 28th, 2008, at p. 66.

⁷⁴⁶ Section 13 of the Group Proceedings Act (2002:599).

⁷⁴⁷ See THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 75-76.

its size, ambit and otherwise must also be appropriately defined.⁷⁴⁸ Finally, the plaintiff taking into consideration his interest in the substantive matter, its financial capacity to bring a group action,⁷⁴⁹ and the circumstances generally, should be appropriate to represent the members of the group in the case.⁷⁵⁰

Moreover, the general rule is that the affected group must be named,⁷⁵¹ and the parties must be represented by a lawyer, who is an advocate.⁷⁵² Only the group claimant becomes a party to the proceedings. The passive group members will have an extensive right of information and limited participation rights, but are mainly represented by the group claimant.⁷⁵³ The passive members do not, as a general rule, have any obligation to pay legal costs in case the defendant is successful since they are not parties to the proceeding.⁷⁵⁴ The rationale is that group members have a right to have their claims heard without incurring any cost risk.⁷⁵⁵ On the contrary, the group claimant must pay the winning party's cost if it loses the action.⁷⁵⁶

Costs that must be reimbursed include, if the value of the dispute exceeds half of the basic amount pursuant to the Act on Public Insurance, the costs for the preparation of the proceeding and the proceeding itself as well as the fees of representatives, provided

⁷⁴⁸ Section 8 of the Group Proceedings Act (2002:599). Factors that may influence on the definition of the group include the geographical domicile of the group members, the availability of client registers, statistical data and the possibilities of transmitting information rapidly and efficiently. See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 86-87.

⁷⁴⁹ This prerequisite does, however, not exclude that the plaintiff obtains financial support in the framework of the public legal aid or takes advantage of a legal insurance available within the group. See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 88.

⁷⁵⁰ Article 8 of the Group Proceedings Act (2002:599).

⁷⁵¹ Section 9 of the Group Proceedings Act (2002:599).

⁷⁵² Section 11 of the Group Proceedings Act (2002:599).

⁷⁵³ See MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1494.

⁷⁵⁴ Section 33 of the Group Proceedings Act (2002:599).

⁷⁵⁵ See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 131.

⁷⁵⁶ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 54.

that the costs have been reasonably necessary in order to enforce the rights of the party. The work and lost time of the party must also be compensated.⁷⁵⁷

However, if the defendant loses the case, but is not able to pay the litigation costs of the plaintiff, the concerned group members must reimburse these costs. This cost rule is designed to prevent that the winning plaintiff would have to bear its own litigation costs.⁷⁵⁸ But the group members must only reimburse the costs of the plaintiff to the amount that each of them has won in the proceeding.⁷⁵⁹ The cost rule is not applicable when the court gives its decision in the case, but can be relied on in an agreement between the plaintiff and the group members or a later claim of the plaintiff against each group member once it has become evident that the defendant will not be able to pay for the plaintiff's litigation costs.⁷⁶⁰

The Group Proceedings Act also provides the possibility to pay an increase in the normal remuneration to the lawyer if the action is successful, thus introducing a moderate form of contingency fee into the Swedish legal system.⁷⁶¹ The risk agreement is an agreement between the claimant and an attorney according to which the fees for the attorney depends on what extent the claims of the members of the group are successful.⁷⁶² Nevertheless, the defendant is never responsible for paying for the costs that exceeds a normal remuneration.⁷⁶³ Instead, the passive group members can be obligated to reimburse these costs to the plaintiff, but only up to the amount that he has won in the group action.⁷⁶⁴

⁷⁵⁷ See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 156.

⁷⁵⁸ *Ibid.*, at p. 131.

⁷⁵⁹ The passive group members can also be obliged to reimburse costs because he has caused an unnecessary court proceeding or other costs that have incurred due to its negligence or omission. See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 132.

⁷⁶⁰ *Ibid.*

⁷⁶¹ See MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1495.

⁷⁶² Section 38 of the Group Proceedings Act (2002:599).

⁷⁶³ Chapter 18, Section 8 of the Code of Judicial Procedure.

⁷⁶⁴ Section 34 of the Group Proceedings Act (2002:599).

The court maintains a comparatively strong position during the proceedings. It must control whether the group claimant represents the interests of the group members not immediately involved in an adequate way. Regarding a possible settlement of the case, all members must be given the opportunity to express their opinions about the proposed settlement agreement, and it must be then admitted by the court in order to be binding on all group members.⁷⁶⁵

Contrary to fears that a collective action would result in numerous lawsuits in Sweden, only few collective actions have been brought.⁷⁶⁶ The practical experience of group actions is accordingly limited. However, even though the number of group actions brought in Sweden is much lower than expected, the first group action in which a judgment was given involved approximately 15,000 group members. It has been estimated that it is probable that most of them would not have brought any individual claim, had the group action not been possible.⁷⁶⁷

But on the other hand, the efficiency of the Swedish group action may be questioned since overall few such actions have been brought, and none have been brought in order to claim compensation for harm caused by anti-competitive conduct.⁷⁶⁸ This question will be analyzed in more detail in the next section on the main obstacles to private enforcement of the antitrust rules in Sweden.

As to the costs of damages actions, lawyers' fees must be reasonable. This is assessed based on a number of factors, such as the scope, nature degree of difficulty and importance of the assignment, the skills and proficiency of the lawyer in question, and the results of his work. The general rule is that fees must be based on an hourly rate or a

⁷⁶⁵ See MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493-1494.

⁷⁶⁶ During the first two and a half years after the introduction of the group action only five such actions were brought. See MICKLITZ, H.-W., and STADLER, A., "The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure", *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493.

⁷⁶⁷ See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 57-58.

⁷⁶⁸ See HENRIKSSON, L., AHRC Project, "Private Enforcement and Consumer Redress in Sweden 1999-2012", at p. 7.

fixed fee.⁷⁶⁹ Contingency fees are usually not allowed since the Swedish Bar Association considers them as disproportionate.⁷⁷⁰ Nevertheless, risk sharing agreements may be allowed if they can be justified by “particular reasons”. For example, if effective access to justice would be difficult without such an agreement or the agreement has been concluded in a cross-border dispute for dealings outside Sweden and it is the prerequisite for the lawyer’s assignment.⁷⁷¹ In these cases, the remuneration of the lawyer will depend on the extent to which the claims have been successful.

In addition, risk agreements are permitted under the Swedish Group Proceedings Act provided that they have been approved by a court.⁷⁷² A prerequisite for approval is that the risk agreement is reasonable considering the nature of the case. It must be made in writing, and it must specify how the fee will differ from the standard fee in case the claim of the group members is upheld or rejected. If the fee is calculated only based on the value of the claim, a risk agreement cannot be approved.⁷⁷³

The Assessment Report on the Group Proceedings Act,⁷⁷⁴ which was conducted in 2008 in order to assess the Group Proceedings Act, found that “no win, no fee” agreements should be approved as such, but there should be a limit on the percentage of the value of the litigation at issue which the lawyer may claim if the case is successful. This percentage should be assessed on a case-by-case basis, and should not exceed 30%.⁷⁷⁵

⁷⁶⁹ See GLADER, M. and ALSTERGREN, P., “Sweden” in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 396.

⁷⁷⁰ See National Report on Sweden prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 12.

⁷⁷¹ See GLADER, M. and ALSTERGREN, P., “Sweden” in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 396.

⁷⁷² Section 38 of the Group Proceedings Act 2002 (2002:599).

⁷⁷³ Section 39 of the Group Proceedings Act 2002 (2002:599).

⁷⁷⁴ THE SWEDISH JUSTICE DEPARTMENT, “Assessment Report on the Group Proceeding”, Ds 2008:74, October 28th, 2008”.

⁷⁷⁵ See THE SWEDISH JUSTICE DEPARTMENT, “Assessment Report on the Group Proceeding”, Ds 2008:74, October 28th, 2008, at p. 178-179.

The “loser pays” principle generally applies to the allocation of costs in court proceedings,⁷⁷⁶ but it is also possible to apportion the costs between the parties depending on the success of their claims.⁷⁷⁷

The costs in court proceedings mainly comprise the costs for preparation⁷⁷⁸ and presentation of the case as well as lawyer’s fees⁷⁷⁹ since court fees are negligible and only include a small fee for filing an application for a writ to the civil court.⁷⁸⁰ As to lawyers’ fees, they are only compensated to the extent that the costs have been reasonably incurred to enforce the party’s rights. The effort and time of the party involved in the litigation must also be compensated. The compensation of litigation costs also includes interest accrued pursuant to the Interest Act⁷⁸¹ from the day the case is decided until the interest is paid.⁷⁸² However, additional costs which have incurred due to a risk agreement are not considered as reimbursable litigation costs.⁷⁸³

3.6.2. Main Obstacles to Private Enforcement

Due to the low number of group actions brought in Sweden,⁷⁸⁴ it is questionable whether the Swedish group action device is efficient. In June 2007, the Swedish Ministry of Justice commissioned an assessment of the Group Proceedings Act. The aim of the assessment was to evaluate whether the objectives underlying the introduction of that law had been met, and whether the legal provisions aiming at safeguarding the interests of the defendant can be considered as expedient. The assessment also intended to examine the effects of the introduction of a group action on small and other enterprises, for instance, with regard to the risk of abuse. The assessment included an

⁷⁷⁶ Chapter 18, Section 1 of the Code of Judicial Procedure.

⁷⁷⁷ Chapter 18, Section of the Code of Judicial Procedure.

⁷⁷⁸ Preparation refers to negotiation aiming to settle the matter in dispute.

⁷⁷⁹ Chapter 18, Section 8 of the Code of Judicial Procedure.

⁷⁸⁰ See ÖBERG, U. and LUNDSTRÖM, J., “Swedish National Report on ‘The judicial application of European competition law’ for the FIDE 2010 Congress Madrid”.

⁷⁸¹ Section 6 of the Interest Act (1975:635).

⁷⁸² Chapter 18, Section 8 of the Code of Judicial Procedure, Act Amending the Code of Judicial Procedure (1987:328).

⁷⁸³ Section 41 of the Group Proceedings Act 2002 (2002:599).

⁷⁸⁴ See THE SWEDISH JUSTICE DEPARTMENT, “Assessment Report on the Group Proceeding”, Ds 2008:74, October 28th, 2008, at p. 34.

analysis of the group actions that have been heard by courts and an examination of possible settlements. It also attempted to examine to what extent threats of initiating a group action have been used as a means to exert pressure defendants, and whether companies' desire to invest in Sweden has been influenced as a result of the Group Proceedings Act. Finally, the task included the submission of proposals on amendments to the law if appropriate.⁷⁸⁵

The assessment report on the Group Proceedings Act was presented May 31st, 2008. The report found that the examination of procedural impediments is too time-consuming, which renders the Act less efficient. The fact that the group representative bears a significant risk of being liable for litigation costs serves as a probable disincentive to bringing a group action in the first place.⁷⁸⁶ Moreover, the special preconditions for bringing a group action are too general, which makes it difficult to assess them and takes too long. The Group Proceedings Assessment Report suggested that the special preconditions should be modified so that the action must be founded on circumstances that are common or essentially of a similar nature for the claims of the group members. The plaintiff must also define the group more precisely, following the Finnish group action model in order to eliminate any doubt about who forms part of the group.⁷⁸⁷

In addition, the precondition that the plaintiff be appropriate to represent the members of the group should be amended by abolishing the reference to its interest in the substantive matter, its financial capacity to bring a group action,⁷⁸⁸ and the circumstances generally since this has resulted in difficulties of interpretation. Instead, the court should be able to assess the appropriateness of the plaintiff as a representative of the group by examining a new precondition, i.e. whether the group action can be decided in an efficient and expedient manner. In case of any abuse by the plaintiff, the

⁷⁸⁵ *Ibid.*, at p. 34-35.

⁷⁸⁶ *Ibid.*, at p. 61-63.

⁷⁸⁷ *Ibid.*, at p. 102-108.

⁷⁸⁸ This prerequisite does, however, not exclude that the plaintiff obtains financial support in the framework of the public legal aid or takes advantage of a legal insurance available within the group. See THE SWEDISH JUSTICE DEPARTMENT, "Assessment Report on the Group Proceeding", Ds 2008:74, October 28th, 2008, at p. 88.

court could thus in the future dismiss an action on the ground that it cannot be decided in efficient and expedient manner.⁷⁸⁹

The Group Proceedings Assessment Report also found that it would be important that the court would decide on the admissibility of the group action at an early stage of the proceedings. Representatives of the parties have claimed that it is problematic that a clearer certification process would be needed in order to decide the preconditions for the group action before the subsequent trial.⁷⁹⁰ The Report suggests thus that an initial compulsory examination of whether there are any procedural impediments to the group action should be required. In the decision of admissibility, the frameworks of the proceeding could then be defined and the scope of the group could be determined. The examination would be based on the information in the application for summons made by the plaintiff,⁷⁹¹ which the plaintiff could complement in case necessary information is missing. In order to avoid costly and time-consuming notifications before the admissibility of the group action has been examined, the group may only be notified once the group action has been admitted. Should, due to changed circumstances, the preconditions for a group action no longer exist later in the proceeding, the court could *ex officio*, or following an objection of the defendant, still dismiss the action pursuant to Chapter 34 of the Code of Judicial Procedure.⁷⁹²

In its decision on admissibility, the court shall determine the group and establish the time period for opting in. The court may also establish certain requirements for the notice of opt-in, which enables the court to direct the proceedings more from the start.

⁷⁸⁹ THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 108-111.

⁷⁹⁰ *Ibid.*, at p. 118-119.

⁷⁹¹ The application for a summons must contain the common circumstance or circumstances of the group members as well as possible differences between their claims which could give cause for dividing the group into subgroups. The group must be clearly determined and the plaintiff shall provide the names and addresses of the members of the group who have already communicated their interest in participating in the group action. In case the names and addresses of potential group members are not provided, their approximate number must be indicated and the plaintiff shall inform the court how they can be reached in order to be notified about the group action. In addition, the plaintiff’s application must include an explanation of why the group action is the best procedural alternative in the case in question and what process economic advantages it would entail. *See* THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 123.

⁷⁹² *See* THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 121-123.

However, the court must not extend the group action to other group members unless the plaintiff has approved this.⁷⁹³

The notification procedure in group actions is perceived as cumbersome. Judges involved in group actions have commented that it requires a significant number of human resources, and sometimes the District Court has been forced to hire personnel in order to send the notifications, and even so, it still took 1-2 months to carry it out. Another problem concerns the approval of the settlement since the case has normally taken so long that the addresses of group members may be out of date. In addition, it is administratively demanding to conduct the proceeding because the active and interested group members require much information about what is going on. This is challenging for an individual group representative.⁷⁹⁴

Therefore, the Group Proceedings Assessment Report suggested that the plaintiff should play a more significant role in the notification process. The court could thus decide that the plaintiff shall notify the group members. If the court decides to do so, it must prescribe how the plaintiff shall report about the notification. As a consequence, the plaintiff will be responsible for classifying the communications, and present the result to the court in clear manner. This extended responsibility for the plaintiff is considered to be in accordance with the prerequisite that the plaintiff be represented by a lawyer and, as a result, it should be able to carry out this task well. The plaintiff will be entitled to request a compensation for the costs of the notification from public funds as it generally rests on the court to handle the notification.⁷⁹⁵

With regard to the choice between an opt-in and an opt-out model, several stakeholders,⁷⁹⁶ which were heard in the context of the assessment of the Group Proceedings Act, maintained that an opt-out model would be preferable, at least in certain situations. This is the case when the claims are of lower value. The National Board for Consumers Complaints suggested that the choice of opt-in or opt-out should

⁷⁹³ *Ibid.*, at p. 125-126.

⁷⁹⁴ *Ibid.*, at p. 77-78.

⁷⁹⁵ *Ibid.*, at p. 80-81.

⁷⁹⁶ For example, house owners, the National Board for Consumers Complaints and Consumer Ombudsman.

be possible on a case-by-case basis taking into account the field of law that the dispute concerns. The Consumer Ombudsman found that in cases involving a large number of consumers, the workload required for defining the group is disproportionately big and it would thus be desirable that the Consumer Ombudsman could bring a declaratory action without defining the group further. The representatives of the parties were divided. On the one hand, they found that foreign companies contemplating establishing themselves in Sweden considered it a disadvantage that collective actions were available in Sweden, but felt more reassured once they learned that it is based on an opt-in model. On the other hand, they found the current law toothless because of the opt-in model, and believed that an opt-out model would significantly facilitate the possibilities of the plaintiff.⁷⁹⁷

The Group Proceedings Assessment Report concluded that there are reasons against the introduction of an opt-out model. Above all, there is a risk that a person can be involved in legal proceedings without having any knowledge thereof, which is contrary to the principle that everyone decides over his legal relationships. In practice, it could also be difficult to submit specified claims and, for example, decide the amount of damages. However, the Report also found that taking into consideration that Norway and Denmark provides for an opt-out group action in certain circumstances, there is a call to follow up the development of those systems. The Report also suggested that the definition of group members shall be decided by the court when it authorizes a group action, and its decision shall include the deadline within which the potential group members must opt in in order to join the group action. If the court so requires, the potential group members must include in their communication their specified claims, the concrete grounds for the claims and circumstances which are relevant for the division of group members into subgroups. In order to make the group action more efficient, the possibility of using conventional calculation of damages and obtaining evidence from the counterparty by the use of discovery (ordering the counterparty to disclose information) or in another appropriate manner have been suggested.⁷⁹⁸

⁷⁹⁷ See THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 68-69.

⁷⁹⁸ *Ibid.*, at p. 63 and 71-72.

Initially, when the introduction of a group action in Sweden was proposed, it was estimated that there would be up to 20 group actions a year and 5-8 thereof would be private group actions. It was also believed that that legal aid and legal insurances would be of importance and most of the cases brought as private group actions would fall within the scope of legal insurances. However, contrary to these expectations, it would appear that legal aid has not been granted in any group actions to date. Similarly, it would seem that legal insurance has generally not been granted either to cover the costs of group proceedings. Instead, only once has legal protection been granted through insurance for a group action. The advantage of legal insurance is that it will cover also the costs of the opposing party that the insured party is obligated to compensate. However, the cap for the compensation is usually SEK 120,000 and, therefore, it will not be sufficient to cover the costs that incur in group actions of a certain size.⁷⁹⁹

One possible interpretation of the low number of group actions brought would be that the group action device is not necessary in the Swedish legal system. Nevertheless, the Group Proceedings Assessment Report found it more likely that more time is required for it to become commonly known and considered a worthwhile alternative. On the other hand, the Assessment Report did not find any evidence that group actions would have been used in order to blackmail the defendant to unfair settlements. Neither has it had any negative effects on foreign investments in Sweden, since potential investors feel reassured when they realize that the Swedish group action is based on an opt-in model.⁸⁰⁰

Other obstacles to full compensation include, as argued by some commentators, the resistance among undertakings to bring antitrust damages actions against other undertakings, although there are some signs that this is changing. Other disincentives are the risk of incurring high costs due to the “loser pays” principle and the difficulty in adducing evidence.⁸⁰¹ Although courts can order anybody to disclose relevant material

⁷⁹⁹ *Ibid.*, at p. 137-143 and 158-159.

⁸⁰⁰ *Ibid.*, at p. 59-61.

⁸⁰¹ See GLADER, M. and ALSTERGREN, P., “Sweden” in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 412.

in its possession,⁸⁰² in practice this is challenging for the claimants since they must specify the document and what it is intended to prove. An additional difficulty is the fact that destruction of evidence is not penalized and, therefore, there is a risk that the defendant destroys the specified documents⁸⁰³. Business secrets and documents subject to legal privilege are also excluded from the disclosure obligation. In case of follow-on actions, the situation is somewhat easier in that once the Swedish Competition Authority has ended its investigation, any individual has a right to request material gathered, created, received or held by the authority.⁸⁰⁴ The only limitations are information protected as confidential under the Publicity and Secrecy Act,⁸⁰⁵ such as business secrets. However, for instance other kind of material provided by a leniency applicant could only be protected if the disclosure of the information would considerably harm the individual or undertaking in question.⁸⁰⁶ Leniency applicants must therefore be aware that information submitted under a leniency application may eventually become public once the public enforcement action has come to an end.⁸⁰⁷ This could consequently have implications for potential applicants' willingness to apply for leniency in the first place.

Moreover, although the limitation period for bringing an antitrust damages action is ten years from the day on which the damage occurred.⁸⁰⁸ Arguably, this could sometimes be problematic, if the potential claimant learns about the infringement and the damages which it has sustained close to the end of the limitation period, as the limitation period can only be interrupted by bringing a legal action. Other ways, such as serving the

⁸⁰² Chapter 38, Section 2 of the Code of Judicial Procedure (1942:740).

⁸⁰³ SOU 2004:10, at p. 100.

⁸⁰⁴ See GLADER, M. and ALSTERGREN, P., "Sweden" in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 408.

⁸⁰⁵ Chapter 3, Section 1 of the Publicity and Secrecy Act (2009:400).

⁸⁰⁶ Chapter 3, Section 3 of the Publicity and Secrecy Act (2009:400).

⁸⁰⁷ See GLADER, M. and ALSTERGREN, P., "Sweden" in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 409.

⁸⁰⁸ Act Modifying the Competition Act (2008:579), SFS 2010:642. This is an important increase compared to the 5-year limitation period that was in force under the 1993 Competition Act (1993:20).

debtor with a written demand, do not serve to interrupt the limitation period,⁸⁰⁹ because the submission of an application for a summons to a court is required in order for an action to be considered to be brought.⁸¹⁰ The calculation of the limitation period from the day on which the damage occurred can also have implications if damages arise later than the infringement and in cases of continuous infringements. In the first case, it plays in the favor of the claimant, while it may give rise to uncertainty for the defendant. In the second case, new losses may arise later, which may complicate the calculation of the amount of damages and interest as well as the bringing of the claim, especially if there have been legislative changes in the meantime.

3.7. Finland

3.7.1. General Overview

Since the adoption of the Finnish Competition Act in 1992, the Act has been subject to several amendments, some of which are also of relevance with regard to private enforcement of competition rules and damages claims. The first substantial amendment entered into force in May 2004 and aimed to adapt the national legal framework to the modernization of the EU competition rules. The second important overhaul took place in 2011.⁸¹¹

Until May 2004, there was only an express legal basis in the Competition Act for damages actions based on a violation of the domestic competition provisions.⁸¹² In other cases, the claimants could only base their claim on the Tort Liability Act if the claim was a non-contractual claim. Conversely, if there was a contractual relationship between the claimant and the infringer, the right to compensation was determined by contract law principles. This had implications for the compensation that could be claimed, since economic loss should in principle be compensated in contractual relationships whereas pursuant to the Tort Liability Act, economic loss is only compensated in exceptional

⁸⁰⁹ See GLADER, M. and ALSTERGREN, P., “Sweden” in FOER, A.A. and CUNEO, J.V. (eds.), *International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, Cheltenham UK and Northampton MA USA, 2010, p. 395-413, at p. 398.

⁸¹⁰ Government Bill 1979/80:119, at p. 56.

⁸¹¹ In addition, the Competition Act (480/1992) has also been amended by Law 303/1998 and Law 1529/2001.

⁸¹² See Section 18a of the Competition Act 480/1992 as amended by Law 1529/2001. This specific legal basis had been introduced in 1998 by Law 303/1998.

circumstances. As the loss resulting from anti-competitive conduct is usually economic loss, victims of an antitrust violation could generally only claim compensation if there was a contractual relationship between them and the infringer. This resulted in a difference in treatment of undertakings depending on the nature of their claim.⁸¹³

This different treatment was abolished following the amendment of the Competition Act in 2004,⁸¹⁴ since it extended the specific legal basis for antitrust damages actions to loss caused by antitrust infringements in both contractual and extra-contractual relationships. In other words, economic loss caused by an anti-competitive conduct must also be compensated in extra-contractual relationships. However, regrettably, the specific legal basis only applied to undertakings, since the Competition Act governs relationships between business undertakings.⁸¹⁵ The exclusion of consumers from the group of claimants benefitting from the specific legal basis seems to contradict the obligation to pay special attention to consumers when the Competition Act is applied.⁸¹⁶

Moreover, the amendment in 2004 also extended the specific legal basis for damages actions contained in Section 18a of the Competition Act to include breaches of Articles 101 and 102 TFEU. The aim was to clarify that the national rules on tort liability also applied to infringements of the EU competition rules.⁸¹⁷ As a result, *“a business undertaking, that, either intentionally or negligently, violates the prohibitions prescribed in Article 4 or 6 [of the Competition Act] or [Article 101 or 102 TFEU], is obliged to compensate the damage caused to another business undertaking. The compensation for damage shall cover compensation for the expenses, price difference, lost profits and other direct or indirect economic damage resulting from the competition restriction”*.⁸¹⁸

⁸¹³ Government Bill 243/1997 to the Parliament on laws amending the Act on Competition Restrictions and certain laws related to it.

⁸¹⁴ Act amending the Act on Competition Restrictions (318/2004).

⁸¹⁵ Government Bill 243/1997 to the Parliament on laws amending the Act on Competition Restrictions and certain laws related to it.

⁸¹⁶ See NYSTRÖM, J., “*Konkurrenserättsligt skadestånd*” in SUOMEN KILPAILUOIKEUDELLINEN YHDISTYS RY, *Kilpailuoikeudellinen vuosikirja 2004*, Helsinki, 2005, p. 233-256, at p. 243.

⁸¹⁷ Government Bill 11/2004 to the Parliament on laws amending the Act on Competition Restrictions and certain laws related to it.

⁸¹⁸ Act on Competition Restrictions (480/1992), incl. amendment (318/2004).

But it was still necessary to distinguish between third party business undertakings and other third parties since the specific legal basis was still limited only to business undertakings.⁸¹⁹ A business undertaking is defined as “*a natural person, or a private or public legal person, who professionally offers for sale, buys, sells, or otherwise obtains or delivers goods or services (product) in return for compensation*”.⁸²⁰ Nevertheless, it is liberally interpreted so, for instance, the State, the municipalities and undertakings owned by them (e.g. municipal water and power utilities) may be regarded as “business undertakings”.⁸²¹ The possibilities of consumers and other persons (e.g. the State and other public entities when they are acting in their capacity as public organs and not as economic actors)⁸²² who did not fall within the definition of “business undertaking” bringing a claim for damages for breach of EU or Finnish competition rules, continued to depend on the general rules of tortious liability.

Under the Tort Liability Act, the loss has been caused deliberately or negligently.⁸²³ This requirement is usually no obstacle to bringing a claim for damages in antitrust violation cases, since undertakings are presumed to know the law.⁸²⁴ More difficult is it for a third party to demonstrate that there are “especially weighty reasons” for compensation for economic loss that is not connected to personal injury or damage to property⁸²⁵ as pure economic loss is only exceptionally compensated under the Tort Liability Act. At least hard-core cartels should be considered as a sufficiently weighty reason, since they are normally committed intentionally and it is clear that they are prohibited. In any case, they would constitute infringements contrary to good practice,

⁸¹⁹ See LESKINEN, C., “*The possibility of third parties bringing EC antitrust damages actions – the case of Spain and Finland*” in ORTIZ BLANCO, L. and MARTÍN DE LAS MULAS BAEZA, R. (eds.), *Derecho de la competencia europeo y español. Volumen VIII*, Dykinson, S.L., Madrid, 2008, p. 35-76.

⁸²⁰ Section 3(1) of the Act on Competition Restrictions (480/1992), incl. amendment (318/2004).

⁸²¹ See JOUTSIMO, M., SARASTE, T. and SILASKIVI, V., “Seuraamukset kilpailunrajoituksista: sanktiot, leniency, myötävaikuttaminen ja vahingonkorvaukset”, *Defensor Legis*, No. 5/2005, p. 1051-1076, at p. 1067.

⁸²² However, as stated, if the State or a municipality has suffered harm when acting on the market through an economic entity, it is considered as an undertaking and may bring an antitrust damages action under Section 18a of the Finnish Competition Act.

⁸²³ Chapter 2, Section 1(1) of the Tort Liability Act (412/1974).

⁸²⁴ See JOUTSIMO, M., SARASTE, T. and SILASKIVI, V., “Seuraamukset kilpailunrajoituksista: sanktiot, leniency, myötävaikuttaminen ja vahingonkorvaukset”, *Defensor Legis*, No. 5/2005, p. 1051-1076, at p. 1069.

⁸²⁵ Chapter 5, Section 1 of the Tort Liability Act (412/1974).

which has been accepted as an “especially weighty reason” justifying compensation for economic loss.⁸²⁶

The use of these different legal bases is illustrated by the Asphalt Cartel.⁸²⁷ Most of the municipalities were not considered as business undertakings since they had purchased the product in order to fulfil a statutory obligation. Therefore, the claims brought under Section 18 of the previous Competition Act were rejected. Some of the municipalities succeeded in claiming damages based on a breach of a contractual relationship because the District Court found e.g. that the illegal infringement as such constituted a breach of the contract. Moreover, in those cases where the claimant also sought damages jointly and severally from infringers other than the contracting party, the Court applied the Tort Liability Act. It considered the harm to constitute pure economic loss, but the requirement of “especially weighty reason” justified its compensation.⁸²⁸

The latest substantial reform of the Finnish Competition Act⁸²⁹ entered into force on November 1st, 2011. Under Section 20 of the new Competition Act, a business undertaking or an association of business undertakings must compensate the damage caused to anyone by a violation of Articles 101 and 102 TFEU or their domestic equivalents (Articles 5 and 7 of the Competition Act) which it has committed either intentionally or negligently. This means that fault is a requirement for liability to incur, although it is sufficient that the infringer has been negligent in breaching the competition rules. Regarding the burden of proof, it is also relevant if a contractual relationship exists between the claimant and the infringer. If there is such a relationship and the antitrust violation also constitutes a breach of contract, the infringer has to prove that he did not behave negligently in violating the domestic or EU competition rules so as not to be obliged to compensate for the harm caused by the antitrust violation. Conversely, if there is no contractual relationship, the burden to prove the existence of negligence falls upon the claimant.⁸³⁰ The degree of fault is also of relevance for the

⁸²⁶ See ROUTAMO, E., STÅHLBERG, P. and KARHU, J., *Suomen vahingonkorvausoikeus*, Talentum Media Oy, Helsinki, 2006, at p. 307.

⁸²⁷ 41 Judgments, see e.g. 13/64901 (Valtio).

⁸²⁸ See KALLIOKOSKI, T. and VIRTANEN, P., ”Kilpailuoikeudellinen vahingonkorvaus asfalttikartellin valossa”, *Defensor Legis*, No. 1/2014, p. 29-46, at p. 34.

⁸²⁹ Competition Act (948/2011).

⁸³⁰ See AINE, A., AHRC Project, “FINLAND, *National Report*”, at p. 10.

amount of damages to be paid because if the damage has been caused deliberately, the general rule is the award of full damages. Only exceptionally could special reasons justify a reduction in the damages.⁸³¹

More importantly, the new Competition Act eliminates the distinction between business undertakings and other victims of a competition infringement. As a result, consumers who have been harmed by an antitrust violation can now rely on Section 20 of the Competition Act in order to claim damages from the infringer. This amendment is in line with the ECJ's decision in *Courage*, according to which anybody who has suffered harm as a result of an antitrust violation should have a right to damages, and is also more compliant with the principle of effectiveness than the previous legal framework.

However, the provisions that were effective when the new act entered into force (e.g. Section 18(a) of Competition Act (480/1992)) must be applied to competition law violations committed prior to the entry into force of the new Competition Act,⁸³² so in those cases standing based on the old Competition Act is still limited to undertakings.⁸³³ With regard to infringements of Articles 101 and 102 TFEU, the obligation for consumers under the old act to base their claim on the Tort Liability Act, which requires “especially weighty reasons” in order to be able to claim compensation for economic loss, appears to breach the principle of effectiveness⁸³⁴ because it constitutes an additional obstacle to obtaining compensation.

Antitrust damages actions may be brought before the ordinary courts, but very few damages actions have been brought both for violations of the national and the EU competition rules.⁸³⁵ With the exception of one case from 1993,⁸³⁶ antitrust damages

⁸³¹ Section 1(2) of the Tort Liability Act (412/1974).

⁸³² Section 50(3) of the Competition Act (948/2011).

⁸³³ Consumers could therefore only base their damages claims for infringements committed before November 1st, 2011 on the Finnish Tort Liability Act or the general principles of contract law. See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 10-11.

⁸³⁴ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 11.

⁸³⁵ Approximately a dozen cases (counting the claims brought based on the number of infringements, i.e. there would be many more claims if all the individual claims related to the *Asphalt Cartel* were counted separately) have been brought, including actions which have been settled or withdrawn. Nevertheless, as judgments of District Courts are not electronically available, it becomes more difficult to obtain comprehensive information about relevant cases. For an extensive examination of antitrust damages actions brought in Finland, see HAVU, K., KALLIOKOSKI, T., and WIKBERG, O.,

actions have only been brought since 2002.⁸³⁷ This is likely to be explained by the lack of case law, the risk of high legal costs, the difficulty in proving the infringement and the extent of the damage, and the previous limitation of the specific legal basis in the Competition Act to business undertakings.⁸³⁸ Other reasons include lack of incentives⁸³⁹ and difficulties in the application of tort rules, such as how remote, indirect harm is to be compensated.⁸⁴⁰ Most of the actions brought in the District Courts have been settled⁸⁴¹ while others are still pending before the courts.⁸⁴² Moreover, most cases have been brought based on infringement of Finnish competition law. Only one, *Qvist Oy v. John Crane Safematic Oy*,⁸⁴³ was also alleged to have breach the EU competition rules. Damages have to date only been awarded by judgment in the *Asphalt Cartel Case*, although the amount awarded was significantly lower (€approximately 37 million) than what the claimants had claimed (€122 million).⁸⁴⁴ In addition, three cases which all

Kilpailuoikeudellinen vahingonkorvaus, Edita, Helsinki, 2010, at p. 129. In addition, there are numerous claims relating to the *Timber Cartel* pending before the District Court of Helsinki.

⁸³⁶ *Suomen yrittäjien keskusliitto v. Tampereen kaupunki*, District Court of Tampere, No. S 93/91.

⁸³⁷ See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingonkorvaus*, Edita, Helsinki, 2010, at p. 130.

⁸³⁸ See THE FINNISH MINISTRY OF INDUSTRY AND TRADE, Comment by the Finnish Ministry of Industry and Trade to the Commission Green Paper on Damages Actions for Breach of the EC Antitrust Rules, at p. 2.

⁸³⁹ See AINE, A., AHRC Project, “FINLAND, National Report”, at p. 9.

⁸⁴⁰ See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingonkorvaus*, Edita, Helsinki, 2010, at p. 132.

⁸⁴¹ See AINE, A., AHRC Project, “FINLAND, National Report”, at p. 1. For instance, *Saunalahti v. Elisa*, District Court of Helsinki, No. 02/15593 and *Radio Nova v. Gramex*, District Court of Helsinki, No. 05/25107.

⁸⁴² Cases that are pending include a number of damages claims relating to the *Timber Cartel Case*. The District Court of Helsinki rejected other 13 damages claims on March 28th, 2014 on the grounds that they were brought after the limitation period had expired. The Court concluded that *inter alia*, thanks to the statement on the timber cartel by Finnish Competition Authority issued on May 25th, 2005, the claimants had sufficient information about whether the cartel had caused them harm. However, one of the judges disagreed, and held that the limitation period had only started to run once the cartel decision had become final by the decision of the Market Court on January 4th, 2010. Therefore, the claims were brought within the 5-year limitation period. This later interpretation is more in line with EU law because it acknowledges that claimants often need to rely on an infringement decision by the competition authorities in order to bring a claim for damages, and the infringement is not definitively established until the decision had become final.

⁸⁴³ *Qvist v. John Crane Safematic*, The District Court of Central-Finland, No. 05/631.

⁸⁴⁴ 41 Judgments, see e.g. No. 13/64901 (*Valtio*).

concerned price discrimination and were settled, also resulted in damages for the claimants.⁸⁴⁵

Most cases have concerned the abuse of a dominant position on the market. The most significant exception is the *Asphalt Cartel Case*, in which the Finnish State and a number of municipalities claimed damages for the overcharge they had paid due to a bid-rigging cartel. The District Court of Helsinki held that the ring-leader Lemminkäinen and six other undertakings were jointly and severally liable to pay damages. The claims of the Finnish State were rejected because, on the basis of new evidence, the Court found that some of its employees involved in laying asphalt had been aware of the existence of the cartel and had participated in it at least during a part of its existence. As a result, the State had not suffered any harm from the cartel because it had approved, participated in, and benefitted from the anti-competitive conduct.

It is also worth noting that the claims for damages have mainly been brought in cases where a contractual relationship exists between the parties, although the claimants in these cases have relied on the specific legal basis for antitrust damages actions in the Competition Act.⁸⁴⁶

Stand-alone actions are permitted as no prior decision of the Finnish Competition Authority or Market Court is required before a claim for damages may be brought. However, the damages actions brought so far have mostly been follow-on actions, which could be explained by the existing obstacles to bringing antitrust damages actions. The only exceptions are *VPT v. Stora Enso*⁸⁴⁷ and *Qvist v. John Crane Safematic*⁸⁴⁸ which were first brought as stand-alone actions, but which led to the

⁸⁴⁵ See *Saunalahti v. Elisa*, District Court of Helsinki, No. 02/15593, *Saunalahti v. Länsilinkki*, District Court of Turku, No. 03/4556, 761/1, and *Radio Nova v. Gramex*, District Court of Helsinki, No. 05/25107.

⁸⁴⁶ See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingonkorvaus*, Edita, Helsinki, 2010, at p. 132.

⁸⁴⁷ *VPT v. Stora Enso*, District Court of Imatra, No. 04/597.

⁸⁴⁸ *Qvist v. John Crane Safematic*, District Court of Central-Finland, No. 05/561.

Finnish competition authority opening an investigation following a request by the claimants after they had faced significant obstacles in bringing the claims.⁸⁴⁹

In *Qvist v. John Crane Safematic* the claimant invoked that some conditions introduced by the defendant into their distribution agreement regarding central oiling systems for different vehicles (in force between February 22nd, 2002 and December 31st, 2004) constituted an abuse of a dominant position, which restricted its possibilities of competing on the market and, therefore, resulted in lost profits, and infringed both the national and EU competition rules. According to the claimant, these conditions restricted it from determining its sale price, using components and oiling systems of competing brands, and selling central oiling systems to new vehicles without the authorization of John Crane Safematic.⁸⁵⁰

The Finnish competition authority did not find that John Crane Safematic had a dominant position on the relevant market, and decided not to investigate the complaint due to the minor significance of the case (*inter alia*, because the competition restrictions did not significantly affect the workable competition in the sector, there were a number of undertakings offering the same services, and consumers also had a number of other competing brands to choose from). Nevertheless, in the reasoning of its decision, the Competition Authority stated that there had been an infringement of the then Article 4 of the Competition Act due to resale price maintenance and Article 4 of the Competition Act which entered into force on May 1st 2004.⁸⁵¹ It is important to note that the applicable national competition rules had changed (on May 1st, 2004) during the duration of the competition restrictions, which explains why the prohibition of active and passive sales was not found to constitute a breach of the Competition Act. Indeed, under the old Competition Act such a prohibition was only infringing the competition rules if it had harmful effects. In the assessment of the effects of the competition restriction, attention had to be paid to the effects of the conduct on the competition conditions in the whole sector/industry, and competition restrictions which did not

⁸⁴⁹ See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingonkorvaus*, Edita, Helsinki, 2010, at p. 131.

⁸⁵⁰ *Qvist v. John Crane Safematic*, District Court of Central-Finland, No. 05/561.

⁸⁵¹ *Qvist v. John Crane Safematic*, No. 139/61/2006, Decision of the Finnish Competition Authority of June 6th, 2008.

significantly reduce competition, but could be classified as minor, would not give cause to action by the competition authorities.⁸⁵² Articles 101 and 102 TFEU were not applied to the case because the case was not found to be capable of having an appreciable effect on trade between Member States.⁸⁵³

The defendant appealed this decision, but the Market Court rejected its appeal on the grounds that the appeal related to the reasoning of the decisions, not to the decision itself. It would only be possible to request an appeal of the reasoning if it were of particular significance for deciding the case at a later stage of the proceedings or in deciding another issue. The Market Court did not find this to be the case, since the reasoning of the decision by the Finnish Competition Authority do not have a binding effect in other proceedings. As a result, the Market Court held that the decision in question had not settled the issue of whether or not the defendant had breached Section 4 of the Competition Act, and the appeal had to be rejected.⁸⁵⁴

As to the action for damages brought before the District Court of Jämsä, the Court rejected the claim that the conditions in the distribution agreement infringed Articles 101 and 102 TFEU since the conduct was not considered to appreciably restrict trade between Member States due to only a minor part of the business activities of the claimants being of international nature. It also found that Section 4 of Competition Act 1992 had not been breached as the distribution agreement had not been held by the Market Court to have harmful effects on competition. However, it held that Section 4 of the amended Competition Act had been breached between May 1st and December 31st, 2004. Despite this, the claim for damages was rejected because the Court found that the claimant had not been able to prove that it had suffered any harm based on the competition infringement between May 1st and December 31, 2004.⁸⁵⁵ On appeal, the Vaasa Court of Appeal held that there had not been any infringement at all of the competition rules since in light of the evidence heard, the defendant had not fixed the

⁸⁵² This rule was modified by the Act Amending the Act on Competition Restrictions (318/2004) in order to bring the Finnish competition rules in line with the EU competition rules.

⁸⁵³ *Qvist v. John Crane Safematic*, No. 139/61/2006, Decision of the Finnish Competition Authority of June 6th, 2008.

⁸⁵⁴ The Finnish Market Court, Judgment of April 3rd, 4.2009, No. 351/08/KR.

⁸⁵⁵ This period of the infringement was governed by the Act Amending the Act on Competition Restrictions (318/2004).

resale price, but the prices indicated by it had been used as guidelines in determining the offers, and the final price depended on a number of factors. Moreover, the Court found that the prohibition of passive sales had in turn not been applied in practice, and the prohibition on active sales had not had any significant effect on the competition on the market. It therefore rejected the damages action.⁸⁵⁶

In another case initially brought as a stand-alone damages action, *Vuoksen Paperituote v. Stora Enso*, the claimant also filed a complaint before the Finnish Competition Authority regarding the conduct of the defendant. The claimant and the defendant had concluded a supply contract for paperboard rolls, according to which the claimants could purchase paperboard rolls from the defendant on the condition that it only used them in its own production, i.e. it was not allowed to resell them to third parties. When the claimant breached the contract, the defendant brought an action against it claiming compensation for the breach of contract. The claimant then raised a counter-claim demanding damages for the loss that it has suffered as a result of their agreement, which it claimed constituted an abuse of a dominant position. The District Court of Imatra requested a statement from the Finnish Competition Authority concerning the relevant competition law issues. The Authority held that Stora Enso did not have a dominant position, and there was also no evidence of any harmful effects on the workable market conditions, which the Court stated had a significant influence on its decision, and it found the statement more credible than statements made by two witnesses.⁸⁵⁷ One possible conclusion from this case and *Qvist v. John Crane Safematic* is that the statements of the Finnish Competition Authority have a considerable influence on the outcome of antitrust damages actions,⁸⁵⁸ and without an infringement decision or its assistance, claimants face great hurdles in proving the existence of an infringement.

In analyzing the possible obstacles to bringing antitrust damages actions in Finland, the issue of burden of proof and access to evidence is similar as in many other civil law jurisdictions, such as Sweden and Spain. The general rule is that the burden of proof lies

⁸⁵⁶ Vaasa Court of Appeal, Judgment of December 9th, 2011, No. S 10/311.

⁸⁵⁷ District Court of Imatra, Judgment of January 19th, 2007, No 04/597.

⁸⁵⁸ See HAVU, K., KALLIOKOSKI, T., and WIKBERG, O., *Kilpailuoikeudellinen vahingonkorvaus*, Edita, Helsinki, 2010, at p. 140.

on the claimant,⁸⁵⁹ but if a party so requests, the courts may order another party to disclose a specified document, which the court considers relevant for deciding the case.⁸⁶⁰ The claimant must show that the person requested to disclose the document in question has it in its possession, and must state the allegation(s) which the document will be used to prove. It must be specified so accurately that the court can order its disclosure under the threat of a penalty payment. For instance, the type of the document must be identified, and the time when it was drafted must be indicated.⁸⁶¹ Usually, injured parties, unless they have participated themselves in the competition infringement, are not likely to have such detailed information about the documents in the possession of the infringers and, therefore, in practice they will not easily be able to request disclosure of evidence.

However, the situation of injured parties is facilitated somewhat by the Finnish Act on the Openness of Government Activities which allows access to the public to public documents held by the authorities.⁸⁶² If the documents are secret or contain confidential information, access will be granted to part of the documents in question.⁸⁶³ Relying on these provisions, injured parties could obtain access to documents held by the Finnish Competition Authority related to an infringement case, except trade secrets and other confidential information.

Once claimants have proved the existence of a competition infringement, they must also prove that it has caused them harm (i.e. the causal relationship) and the extent of the harm that they have suffered. This is often challenging in practice, especially for indirect purchasers. For instance, claimants bringing an action for damages caused by a cartel would have to show that the higher price that they have paid is actually a result of the cartel activity and not the market situation or market structure.⁸⁶⁴ There is no

⁸⁵⁹ Chapter 17, Section 1(1) of the Code of Judicial Procedure (4/1734) as amended by law 571/1948.

⁸⁶⁰ Chapter 17, Section 12(1) of the Code of Judicial Procedure (4/1734) as amended by law 571/1948.

⁸⁶¹ See KANNIAINEN, V., SARASTE, T. and TAMMELIN, K.: "Kartellivahingon ja sen määrän toteennäyttäminen vahingonkorvausoikeudenkäynnissä", *Defensor Legis* No. 3/2006, p. 419-440, at p. 426-427.

⁸⁶² Article 9 of the Act on the Openness of Government Activities (621/1999).

⁸⁶³ Article 10 of the Act on the Openness of Government Activities (621/1999).

⁸⁶⁴ See KANNIAINEN, V., SARASTE, T. and TAMMELIN, K.: "Kartellivahingon ja sen määrän toteennäyttäminen vahingonkorvausoikeudenkäynnissä", *Defensor Legis* No. 3/2006, p. 419-440, at p. 423.

express legal provision regarding the passing-on defense, but as damages should constitute full compensation, and may not result in unjust enrichment,⁸⁶⁵ passing-on seems to be accepted since if it were not, the claimant would be unjustly enriched. It is also very difficult to demonstrate the temporal and geographical scope of the cartel, and the scope of the product market covered by the cartel.

Since October 2007, when the Act on Class Actions⁸⁶⁶ entered into force, collective actions are also in principle possible, but they are limited to the Consumer Ombudsman bringing a collective action on behalf of a group of consumers in mass consumer disputes between consumers and a trader⁸⁶⁷ when those matters come within the jurisdiction of the Consumer Ombudsman. The jurisdiction of the Consumer Ombudsman is wide, including disputes relating to the terms of an agreement between consumers and business undertakings. The Act on Class Actions is silent on matters related to antitrust infringements, so it would depend on each individual case whether it falls within the competence of the Consumer Ombudsman. But it would seem that the Consumer Ombudsman could bring an antitrust action on behalf of a group of consumers in civil matters between consumers and cartel members, or between consumers and an undertaking which has abused its dominant position on the market.⁸⁶⁸ Nevertheless, to date, the Consumer Ombudsman has not brought any antitrust class actions.⁸⁶⁹

Moreover, the claims of the consumers must be based on the same or similar circumstances, the hearing of the case as a class action must be expedient taking into account the size of the class, the subject-matter of the claims and the proof offered in it, and the class must be defined with adequate precision.⁸⁷⁰ The Finnish class action is based on an opt-in model, and the decision of the court is binding on the group members

⁸⁶⁵ See ROUTAMO, E., STÅHLBERG, P. and KARHU, J., *Suomen vahingonkorvausoikeus*, Talentum Media Oy, Helsinki, 2006, at p. 371.

⁸⁶⁶ Act on Class Actions (444/2007).

⁸⁶⁷ Section 1 of the Act on Class Actions (444/2007).

⁸⁶⁸ See KANNIAINEN, V., SARASTE, T. and TAMMELIN, K.: “Kartellivahingon ja sen määrän toteennäyttäminen vahingonkorvausoikeudenkäynnissä”, *Defensor Legis* No. 3/2006, p. 419-440, at p. 421.

⁸⁶⁹ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 12.

⁸⁷⁰ Section 2 of the Act on Class Actions (444/2007).

who have joined the action by sending a letter of accession to the group within the time limit set by the court⁸⁷¹ and the court has designated as class members in its decision.⁸⁷²

With regard to the group, it is not necessary to include the names and addresses of the group members already in the application for a summons. It rests on the court, before the summons is issued, to inform the parties by mail or electronically that the handling of the group action has been initiated, which judge is in charge of the preparation, and within what timeframe the notification to the group members must take place. It corresponds then to the plaintiff to notify the group members, who are known to him. If it is not possible to reach the group members by mail or electronically, it is also allowed to give notice of the group action in a newspaper or several newspapers or by using another appropriate means. The plaintiff must also notify the defendant about the group action.⁸⁷³

All group members who have informed the plaintiff in writing about their desire to belong to the group within the prescribed time are considered group members. A group member may opt out from the group until the case is transferred to the main proceeding. After the main proceeding has been initiated, opt-out is only possible with the consent of the defendant.⁸⁷⁴

Within one month from the expiration of the time for opting into the group, the plaintiff must submit a supplemented application for a summons to the court. This must include the names and addresses of the group members, their individualized claims and, if necessary, the specified grounds.⁸⁷⁵ The court then issues a summons requesting the defendant to submit his written rejoinder.⁸⁷⁶

Alternatively, the Finnish Consumer Ombudsman may choose to bring a group claim before the Consumer Dispute Board, which is an independent expert out-of-court body

⁸⁷¹ Section 8 of the Act on Class Actions (444/2007).

⁸⁷² Section 16 of the Act on Class Actions (444/2007).

⁸⁷³ Section 6 of the Act on Class Actions (444/2007).

⁸⁷⁴ Section 15 of the Act on Class Actions (444/2007).

⁸⁷⁵ Section 9 of the Act on Class Actions (444/2007).

⁸⁷⁶ Section 10 of the Act on Class Actions (444/2007).

whose activities are fully financed by the Finnish State.⁸⁷⁷ The conditions for submitting a group claim are that several consumers have the claims against the same trader and they may be solved by one single decision.⁸⁷⁸ The Consumer Ombudsman must define the group of consumers, for instance, to cover all consumers who have brought a defective consumer product.⁸⁷⁹ The group claim is an opt-out action in that it is possible for consumers to opt out if a more individual treatment is called for due to the higher economic loss which they have suffered. However, the decisions of the Consumer Dispute Board are only recommendations, so they cannot be enforced if the traders do not comply with them.⁸⁸⁰

The threshold for bringing an action in Finland is generally high because the liability for costs in civil law matters is based on the principle of full compensation.⁸⁸¹ This means that the losing party must bear all reasonable legal costs incurred by the necessary measures of the winning party.⁸⁸² Moreover, if the claimant wins the case in the District Court but then loses in the Court of Appeal, he will be liable for also paying the costs of the other party incurred during the handling of the case in the District Court. The underlying idea behind the principle of full compensation of costs is that, in addition to other sanctions for not complying with one's contractual or other obligations, the risk of having to fully bear the litigation costs of the other party would have a preventive effect of reducing disputes and ensuring the fulfillment of material law. However, as one commentator has pointed out, the effect in cases where the outcome is uncertain is that the threshold for bringing the action has risen considerably.⁸⁸³

⁸⁷⁷ See CIVIC CONSULTING, "Country report Finland", prepared by K. VIITANEN, 7.3.2008, at p. 9, available at http://ec.europa.eu/consumers/redress_cons/fi-country-report-final.pdf.

⁸⁷⁸ Section 4 of the Consumer Dispute Board Act.

⁸⁷⁹ Government Bill 115/2006 on the Consumer Dispute Board Act, at p. 18.

⁸⁸⁰ See CIVIC CONSULTING, "Country report Finland", prepared by K. VIITANEN, 7.3.2008, at p. 11, available at http://ec.europa.eu/consumers/redress_cons/fi-country-report-final.pdf.

⁸⁸¹ See VIITANEN, K., "Oikeudenkäyntikulut ja oikeuksien saatavuus", *Defensor Legis*, 87, No 4, 2006, p. 614-632, at p. 620.

⁸⁸² Chapter 21, Section 1 of the Code of Judicial Procedure 4/1734, as amended by law 368/1999.

⁸⁸³ See VIITANEN, K., "Oikeudenkäyntikulut ja oikeuksien saatavuus", *Defensor Legis*, 87, No 4, 2006, p. 614-632, at p. 621.

In order to mitigate the effects of the principle of full compensation, the cost rules were amended in 1999.⁸⁸⁴ Thus, if the legal issues of the case are so unclear that litigation by the losing party is justified, the court can decide that both parties must fully or partly bear their own litigation costs.⁸⁸⁵ The problem with this provision is that it is not applicable when the facts of the case are unclear, which arguably would frequently be the case in a claim for antitrust damages since the scope and amount of the damage are usually some of the most difficult issues to prove, in particular, when the claimant is an indirect purchaser. In addition, the court may *ex officio* reduce the amount that the party must pay if, taking into account the circumstances that gave cause to the litigation, the position of the parties, and the significance of the case, it would be very unreasonable to oblige the party to bear the costs of the opposing party.⁸⁸⁶ But since the provision is very ambiguous, and it will not be possible to predict whether or not the court in question will apply it in a concrete case, its significance will, in practice, probably not be important.⁸⁸⁷

Contingency fees are allowed, but they are seldom used, at least as the sole basis for calculating the legal fee. Instead, lawyers' fees in cases involving litigation in court are usually charged using hourly fees. This is due to the fact that the value of claims in disputes are usually so low that the percentage of the lawyer's contingency fee would have to be considerably high compared to the value of the claim before a contingency fee system would be economically attractive from the lawyer's point of view. What is more, the use of contingency fees would only liberate the losing party from paying the fee to his counsel but he would still be responsible for bearing the costs of the winning party. In addition, legal aid does not, in principle, cover costs that have been ordered to be paid to the opposing party and, therefore, does not foster the use of contingency fees.⁸⁸⁸

⁸⁸⁴ *Ibid.*, at p. 621.

⁸⁸⁵ Chapter 21, Section 8a of the Code of Judicial Procedure (4/1734).

⁸⁸⁶ Chapter 21, Section 8b of the Code of Judicial Procedure (4/1734).

⁸⁸⁷ See VIITANEN, K., "Oikeudenkäyntikulut ja oikeuksien saatavuus", *Defensor Legis*, 87, No 4, 2006, p. 614-632, at p. 622.

⁸⁸⁸ See VIITANEN, K., "Oikeudenkäyntikulut ja oikeuksien saatavuus", *Defensor Legis*, 87, No 4, 2006, p. 614-632, at p. 616-620.

As to damages, under Section 20 of the new Competition Act, the compensation for loss shall cover compensation for the expenses, price difference, lost profits and other direct or indirect economic loss resulting from the competition restriction. The damages are therefore limited to economic loss. Punitive damages are not available. If the claimant has participated in the antitrust violation, this can be taken into account in calculating the amount of the damages.⁸⁸⁹ Civil courts also have the power to assess a reasonable amount of damages if no evidence is available or if evidence can only be presented with difficulty,⁸⁹⁰ which should somewhat facilitate the bringing of antitrust damages actions.

Infringers are in principle jointly and severally liable for the damage caused by an antitrust violation. But if a person has not been rendered liable in full damages, he must only pay the amount of the award he is liable for.⁸⁹¹ The liability in damages must be allocated depending on “*the guilt apparent in each person liable, the possible benefit accruing from the event and other circumstances*”.⁸⁹² Anybody who has paid damages beyond his allocated share has a right to contribution from the other infringers liable for the damages paid on their behalf. However, if a person liable for damage is insolvent or his whereabouts are unknown, the other infringers must compensate for their share of the shortfall.⁸⁹³

The limitation period for bringing antitrust damages claims has been clarified by the new Competition Act. For stand-alone actions, the claims must be brought within ten years of the date on which the violation occurred, or within ten years of the date on which a continuous infringement ended. For follow-on actions, the limitation period cannot expire until one year has passed from the date that the decision finding an antitrust violation becomes final.⁸⁹⁴ These limitations period are therefore in line with the minimum limitation period laid down in the Directive on Antitrust Damages Actions (and even more generous for stand-alone actions). Importantly, the new limitation

⁸⁸⁹ Chapter 6, Section 1 of the Tort Liability Act (412/1974).

⁸⁹⁰ Chapter 17, Section 6 of the Code of Judicial Procedure (4/1734 (as amended by law 571/1948)).

⁸⁹¹ Chapter 6, Section 2 of the Tort Liability Act (412/1974).

⁸⁹² Chapter 6, Section 3(1) of the Tort Liability Act (412/1974).

⁸⁹³ Chapter 6, Section 3(2) of the Tort Liability Act (412/1974).

⁸⁹⁴ Section 20(3) of the Competition Act (948/2011).

periods no longer start to run from the date on which the business undertaking was informed or should have been informed of the occurrence of the harm, which is not always easy to determine,⁸⁹⁵ as could be seen in the first claims for damages related to the *Timber Cartel* which were decided in March 2014.

3.7.2. Main Obstacles to Private Enforcement

There is very limited case law on antitrust damages actions in Finland. Some of the obstacles can be explained by the previous legal framework. For instance, the previous Competition Act only provided for an express legal basis for competitors and other undertakings to bring antitrust damages actions,⁸⁹⁶ which made it more difficult for consumers and other non-business undertakings to bring a claim for damages, since they had to resort to general tort law. As a result, they had also to justify that there was an especially weighty reason for compensating economic loss.⁸⁹⁷ Therefore, this distinction between different categories of claimants constituted an additional obstacle for non-business undertakings bringing a damages action. This distinction was not justified taking into account especially the fact that competitors and other undertakings that have suffered loss as a result of an antitrust violation can pass on the overcharge to their customers, whereas consumers have to bear the whole loss themselves. In fact, consumers usually suffer the most from antitrust violations either by the higher prices that they must pay to the infringers, or indirectly if other undertakings that have suffered harm as a result of an antitrust violation pass on their losses to the consumers.⁸⁹⁸

The new Competition Act will reduce some of the obstacles for those competition infringements which have been committed after the new act entered into force in November 2011. Most importantly, consumers can now rely on the specific legal basis laid down in Section 20 of the Competition Act, and no longer need to prove the existence of an especially weighty reason in order to claim compensation for economic loss. Moreover, uncertainty about the limitation periods has been reduced by stipulating

⁸⁹⁵ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 12.

⁸⁹⁶ Section 18a of the Competition Act (318/2004).

⁸⁹⁷ Chapter 5, Section 1 of the Tort Liability Act (412/1974).

⁸⁹⁸ Comment by the Nordic Consumer Ombudsmen to the Commission Green Paper on “Damages Actions for Breach of the Community Competition Rules” as laid down in Articles 81 and 82 EC COM(2005) 672 final, Brussels, 19.12.2005, at p. 1.

more exactly from which moment the limitation period will start to run. By providing for a new limitation period for follow-on actions, injured parties should in such cases in principle be able to bring their claim within the limitation period. However, for competition infringements which were committed before the new Competition Act entered into force, the former limitation period may remain problematic as case law has shown because of uncertainty about the moment from which the claimant can be considered to have had sufficient knowledge about its claim.

Another factor explaining the lack of antitrust damages claims brought by consumers is that the Finnish class action can only be brought by the Consumer Ombudsman for a group which can be determined in advance, and the Consumer Ombudsman has not brought any antitrust class actions to date. This indicates that consumers do not have an effective remedy to claim damages. On the other hand, it is true that group claims before the Consumer Dispute Board could be a possibility since it is based on the opt-out model. However, it is problematic that the Board only issues recommendations, so the incentives of infringers to follow those recommendations are debatable. Another difficulty could be that the Consumer Dispute Board might not have the sufficient expertise in competition law and in assessing economic evidence required in order to prove the harm and in particular to quantify it.

Access to evidence as well as the difficulties in proving the causal relationship between the infringement and the harm suffered, constitute the main obstacles to antitrust damages actions in Finland. The possibility of requiring the infringer to disclose documents in its possession proving the existence of a competition infringement is also limited because the documents have to be accurately specified, including the time when the documents was drafted.⁸⁹⁹

Due to the prohibition of unjust enrichment, the claimant must demonstrate exactly what part of the overcharge resulting from the antitrust violation has been passed on to the next level in the distribution chain, and ultimately to him. Therefore, it is very

⁸⁹⁹ See Chapter 17, Section 12(1) of the Code of Judicial Procedure (4/1734) as amended by law 571/1948, and KANNIAINEN, V., SARASTE, T. and TAMMELIN, K.: “Kartellivahingon ja sen määrän toteennäyttäminen vahingonkorvausoikeudenkäynnissä”, *Defensor Legis* No. 3/2006, p. 419-440, at p. 426-427.

challenging for others than direct purchasers to meet the burden of proof in order to bring damages actions. Even more difficult is it for consumers, because they usually have less of resources to defend their interests and are at the bottom of the distribution chain. It is thus particularly challenging for them to prove the causal relationship.

Follow-on actions are the most realistic possibility of consumers bringing damages claims, although in practice due to the often limited individual amount of harm suffered, even follow-on actions would only be viable if they were brought as class actions allowing for sharing the costs of the action and pooling the evidence and information available to the whole group. The lack of opt-out collective actions coupled with low incentives and high risks in the form of legal costs and risks as well as the high burden of proof explain why only undertakings and municipalities have brought damages claims.

In general, also undertakings have had to resort follow-on damages actions. The only few actions initially brought as stand-alone actions ultimately had to be stayed in order to wait for the Finnish Competition Authority to consider the matter and issue a statement. The role of the competition authority seems to be significant as courts tend to give more value to its statements than other type of evidence brought in the case.⁹⁰⁰ Consequently, under the existing system, its involvement either in the form of an infringement decision or as *amicus curiae* appear to be a prerequisite for the claimant to overcome at least some of the initial hurdles in bringing a claim for damages. There are also numerous follow-actions in the making relating to the *Timber Cartel Case* which implies that there will be an increase in private enforcement.⁹⁰¹ However, again the claimants are municipalities, and actions by consumers are not to be expected.

3.8. Conclusions

In spite of the established Union right to damages for antitrust violations and an increase in antitrust damages actions brought in the past years, the number of actions brought in the EU is still comparatively low. There has been some development regarding the types of actions brought. In 2006, the Impact Study found that although

⁹⁰⁰ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 13.

⁹⁰¹ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 1.

the situation seemed to be somewhat better with respect to actions based on vertical restraints and abuses of dominance, the former type of actions did not usually result in damages being awarded, and the latter tended to be successful only in approximately half of the cases. It also found that especially damages actions based on hardcore cartels were seldom brought, and were often not successful.⁹⁰² However, the more recent AHRC Research Project on Competition Law: “*Comparative Private Enforcement and Collective Redress in the EU 1999-2012*” found that the relative success rate for damages across the EU during the research period was relatively high, amounting to 45.5%, if both successfully and successfully actions are considered together.⁹⁰³ But the success rate in a particular case will vary depending on in which jurisdiction it is brought. The scarcity of antitrust damages actions is common for some of the Member States, which are the object of the analysis in this thesis, particularly Finland and Sweden, although there have recently been a number of follow-on actions. In addition, a number of other Member States seem to be facing similar obstacles.⁹⁰⁴ Also Member States where antitrust actions are brought fairly frequently, such as the United Kingdom and Germany, damages are seldom awarded in hardcore cartels,⁹⁰⁵ and actions are rarely brought by consumers.⁹⁰⁶ Finally, Impact Assessment Report on Damages Actions of 2013 has found that follow-on actions based on Commission Decisions are concentrated to only seven Member States.⁹⁰⁷

It is particularly striking that damages actions are not often brought by victims of hardcore cartels. It is understandable that this type of damages claims are not brought as stand-alone actions, as it is already difficult for competition authorities, which have wide powers of inspection at their disposal to detect these secret agreements. Therefore, it is virtually impossible for victims of cartel agreements to adduce sufficient evidence to prove the infringement and the damage that they have suffered as a result of it. But,

⁹⁰² See Impact Study, at p. 38-40.

⁹⁰³ See RODGER, B.J., (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, Alphen aan den Rijn, 2014, at p. 154.

⁹⁰⁴ E.g. Poland, the Czech Republic and Malta. See RODGER, B.J., (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, Alphen aan den Rijn, 2014, at p. 126.

⁹⁰⁵ See Sections 3.2 and 3.3.

⁹⁰⁶ See RODGER, B.J., (ed.), *Competition Law Comparative Private Enforcement and Collective Redress across the EU*, Wolters Kluwer, Alphen aan den Rijn, 2014, at p. 300.

⁹⁰⁷ Impact Assessment Report on Damages Actions, at p. 19.

in the light of the numerous Commission Decisions between 200-2012⁹⁰⁸ imposing fines on cartel members, one would imagine that follow-on actions for damages would be more frequent, especially since the claimant could refer to the Commission Decision in order to establish the existence of an infringement of the EU competition rules.

One explanation for this is that many potential actions for damages are settled. This appears to be quite common especially in the United Kingdom,⁹⁰⁹ but damages claims are also settled in other Member States.⁹¹⁰ But the most plausible explanation is that too many obstacles to bringing antitrust damages actions currently exist in the Member States. The Commission Green Paper on Damages actions for breach of the EC antitrust rules listed numerous of them which existed at that time. Based on the brief analysis in this thesis of the situation in the United Kingdom, Germany, France Spain, Sweden and Finland, one could highlight a few of them which still seem to be problematic. High legal costs and the uncertainty of the outcome of the action seem to serve as disincentives to bring damages claims. The burden of proof is high, requiring claimants not only to establish the infringement of the competition rules and demonstrate the causal relationship between the infringement and the harm that they have suffered as a result of it, but also to quantify the exact amount of damage suffered. This could be particularly demanding in cases involving price-fixing for intermediary products if the injured parties are indirect purchasers. As access to evidence is, in general, limited – except in the United Kingdom⁹¹¹ where discovery rules considerably alleviate this task – most claimants are probably deterred from initiating proceedings, since the proceedings are often lengthy and costly, and the claimants may lack both financial resources and the expertise required to bring an antitrust damages claim.

For consumers, in particular those who usually have comparatively small claims in comparison to the potential high cost, the task is virtually impossible and stand-alone actions are unthinkable. But also small and medium-sized undertakings might face the

⁹⁰⁸ See Statistics on cartel cases decided by the European Commission between 2000 and 2012 available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

⁹⁰⁹ See RODGER, B.J., “Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000-2005”, *E.C.L.R.*, Volume 29, Issue 2, 2008, p. 96-116, at p. 97.

⁹¹⁰ See, for instance, the cases of Sweden and Finland in Sections 3.6 and 3.7.

⁹¹¹ Also Ireland has more generous discovery rules than those in the civil law jurisdictions.

same hurdles, especially in situations where they are indirect purchasers and would be required to show the exact amount of the overcharge that has been passed on to them. Consequently, for consumers and small and medium-sized businesses it would be important to be able to bring a collective action together with other victims in order to reduce the costs and risks of the action, and to actually have an incentive to bring a claim.

But the availability of collective actions in the EU leaves much to wish for. Of the six Member States analyzed in this thesis, only the United Kingdom⁹¹² and France⁹¹³ expressly provide for representative actions/collective actions for damages based on a breach of the national or the EU competition rules. Nevertheless, these actions can only be brought as follow-on actions (although the new collective action in the UK will also be possible as a stand-alone action), after a decision by the European Commission or the national competition authority establishing the infringement in question. Furthermore, these actions are limited to consumers, even though soon SMEs will also be able to bring collective actions in the United Kingdom.⁹¹⁴ It is also important to note that the French collective action may only be brought by French consumer associations,⁹¹⁵ which impedes other consumer associations from bring a collective action on behalf of consumers from different Member States in France.

In principle, Sweden also provides for a potentially extensive collective action, a so-called private group action, which can either be brought by a natural person or a legal person on behalf of the affected group. What makes this type of action attractive, at least in theory, is that it is possible to use a modified version of contingency fees, a so-called risk-agreement, to bring the action. However, the group action is based on the opt-in model, and so far no such actions have been brought in order to claim compensation for antitrust violations.

⁹¹² Section 47A of the Competition Act 1998.

⁹¹³ Articles L. 423-1 and L. 423-17 of the Consumer Act.

⁹¹⁴ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 31.

⁹¹⁵ Articles L. 423-1 of the Consumer Act.

Although there is no specific collective action for antitrust claims in Spain, consumer (and user) associations could bring collective actions for damages caused by an infringement of the competition rules. Furthermore, if the members of the affected group are identified or are easily identifiable, also the affected group can bring collective actions for damages.⁹¹⁶ It is possible to advertise the claim in order to locate all injured parties, if they are not identified or easily identified.⁹¹⁷ If the injured parties are identified or can easily be identified, the claimant has the obligation of informing that he has filed the claim to all those parties that may be interested in joining the action.⁹¹⁸

However, the problem with the Spanish collective action is, first, that any award is made with respect to each individual claimant, and not the whole group, so each claimant must apply to the court in order to be recognized as a member of the group and for individual damages to be quantified.⁹¹⁹ If the claim is very small, the claimant might not bother to take the steps necessary to join the action because it is often difficult to calculate the exact amount of the damage that he has suffered. Instead, it would be preferable to be able to bring the action as an opt-out action and once the liability and total harm caused have been established, proceed to identifying the individual claimants and their quantum. Second, the collective action is only available to consumers, which makes it difficult especially for small and medium-sized companies to enforce their rights if they have been victims of an antitrust violation.

The Finnish collective action is even more limited since it can only be brought by the Consumer Ombudsman for a group determinable in advance.⁹²⁰ Finally, in Germany, collective actions are limited to applying for injunctions or to order the infringers to transfer their illegal proceeds to the Treasury, and damages claims may thus not be brought under such actions.⁹²¹ But a German court has allowed several claims to be

⁹¹⁶ Article 11 of the Civil Procedure Law 1/2000.

⁹¹⁷ Article 15(3) of the Civil Procedure Law 1/2000.

⁹¹⁸ Article 15(2) of the Civil Procedure Law 1/2000.

⁹¹⁹ See National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.

⁹²⁰ Section 1 of the Act on Class Actions (444/2007).

⁹²¹ Section 34a of the Act Against Restraints of Competition.

bundled into one legal person by allowing the Belgian company, Cartel Damage Claims SA, to bring in its name damages claims that it had bought from several customers, who had allegedly been harmed by the concrete cartel.⁹²² So this could sometimes be an alternative for numerous injured parties to bring their claim, but it is limited to situations where their costs will be lower than the expected damages awards, so again consumers are not likely to benefit from this type of action.⁹²³

The current situation in the EU regarding collective actions is fairly unsatisfactory. In practice this means that the potentially only truly effective redress mechanism for consumers harmed by an antitrust violation is not generally an alternative since the existing collective actions have many flaws. In those jurisdictions where such actions are available, they are seldom brought and their success is very limited as experience from the six jurisdictions studied show. The opt-in model is insufficient in many cases as the group of claimants tends to be too small for the action to pay off, and leads to administrative complexity and high costs.

Spanish law has provided for collective actions for almost ten years, but so far only one collective action for antitrust damages has been brought. This would imply that either there is no need for a collective action for victims of antitrust violations, or the action is not sufficiently efficient for claimants to make use of it. The first explanation is unlikely because, as has been seen in the section on Spain, there have been, and still are, several obstacles to private enforcement in Spain, which make it challenging in particular for consumers to bring an action for damages. Until the *DISA* ruling only follow-on actions were possible for breaches of the EU competition rules, and stand-alone actions based on the Spanish competition rules have been permitted only since the new Competition Law 15/2007 entered into force. These restrictions made the process of bringing a damages claim even longer (e.g. the various proceedings in *Antena 3* lasted 15 years in total!), so it is not surprising that harmed consumers have not attempted to bring a collective action for damages.

⁹²² See THOMAS, S., “De facto class action for cartel damages in Germany? A German Court rules on procedural key issues for cartel damages suits (Cartel Damage Claims SA), *e-Competitions*, February 2007-II, N° 13224. This would also be possible under Finnish law.

⁹²³ See WAGNER, G., “Collective redress – categories of loss and legislative options”, *L.Q.R.*, 127(Jan), 2011, p. 55-82, at p. 75.

Similarly, in Finland, until November 2011, when the new Competition Act entered into force, consumers could not benefit from the specific legal basis for bringing antitrust damages actions, but had to rely on the general tort rules, which would require them in addition to demonstrate the existence of especially weighty reasons in order to claim compensation for economic loss. This additional requirement therefore added to the other existing obstacles to bringing antitrust damages claims in the first place.

Apart from the lack of effective collective actions, there are also other reasons explaining why consumers do not often bring antitrust damages actions. Consumers are not necessarily aware that they have been victims of a cartel, because cartels are normally secret and detecting and proving their existence is demanding even for public enforcers of competition rules despite their wide powers of investigation. Since access to evidence for private litigants is limited and the burden of proof is high, proving the existence of an anti-competitive conduct is very difficult. For instance, in Spain the obligation to quantify damages and the unwillingness of courts to award compensation for the loss of profit renders private antitrust litigation complicated. Furthermore, the risk of losing, associated with the obligation to pay the costs of litigation of the other party, serve as disincentives for claimants with small damages claims to initiate proceedings. In other words, it would seem that there should be a need for a collective action that would reduce the costs and risks of litigation and make economies of scale possible.

Consequently, one could assume that the reason why collective actions have not been used is, at least partly, that it is not perceived as an efficient redress mechanism among consumers and that consumer associations either do not have any interest in pursuing antitrust damages actions, or that they simply do not have the required expertise and resources. Finally, as in most jurisdictions only consumer and user associations and/or affected groups of consumers can bring a collective action for damages, competitors and other undertakings, which could have a better knowledge of the existence of competition infringements and of competition rules, are barred from bringing such an action.

Another possible explanation suggested at least as far as Sweden is concerned, is that the possibility of claiming injunctions would be sufficient to address the problem in that

it addresses the anti-competitive conduct. Such claims for injunctions may be brought before the Market Court once the Swedish Competition Authority has decided not to proceed with an investigation. It has been concluded that since follow-on actions for damages have not been brought after the Market Court has found an infringement resulting in an injunction, there might not be a particular need for damages.⁹²⁴ Another possible reading is, however, that at least in some cases damages claims have not been brought due to the challenges in bring such actions. Moreover, applications for injunctions have been brought by other undertakings, not consumers.

But since a number of Member States have in the past decade introduced collective actions and have envisaged improving those actions, it would nonetheless appear as there would be a political will to enhance the redress mechanisms of victims of antitrust violations. Germany is the only Member State that excluded the possibility of bringing collective damages actions when it amended its Competition Act, probably because it feared that this would result in excessive litigation and unmeritorious claims being brought. Even in its latest amendments to the German Competition Act, consumer associations were only given power to request injunctions or the transfer of illegal profits to the Treasury.⁹²⁵ But, for instance, the Spanish and Swedish experience has shown that these fears are not necessarily justified.

Another common theme in light of the analysis of the six Member States is the high costs and risks of bringing antitrust damages actions. The “loser pays” rule applies in all jurisdictions, although some courts (e.g. the CAT) have more discretion in deciding on the allocation of the costs of the proceedings. More flexible cost rules are also available for certain types of claims (e.g. antitrust damages claims in Germany if the financial situation of the claimant would otherwise impede him from bringing a meritorious action).⁹²⁶ There are still also a number of limitations on the use of contingency fees, although increasingly more Member States seem to be willing to allow them in certain cases.

⁹²⁴ See HENRIKSSON, L., AHRC Project, “*Private Enforcement and Consumer Redress in Sweden 1999-2012*”, at p. 9.

⁹²⁵ Section 34a of the Act Against Restraints of Competition.

⁹²⁶ Section 89a of the Act Against Restraints of Competition.

Coupled with limited possibilities of ordering disclosure of documents/information in the possession of the other party or third parties, the only realistic possibility of bringing an antitrust damages action would often be a follow-on action. Again, consumers would need an effective collective action even in most of these cases. It is acknowledged that in some jurisdictions stand-alone actions appear to be more common, but they are usually brought based on the abuse of a dominant position or vertical restraints.

All of the above is likely to explain why – despite an increase in the past 5-10 years – damages claims are still not often brought successfully and why they are hardly brought at all by consumers. A common solution to make the enforcement of the Union right to damages effective is therefore required.

PART II: THE FLAWS AND MISSING PIECES OF THE CURRENT REFORM

4. DIRECTIVE ON ANTITRUST DAMAGES ACTIONS

4.1. Background and General Overview

The Draft Directive on Antitrust Damages Actions proposed by the Commission in June 2013 was rather different from the unpublished Failed Draft Directive of 2009 and the measures proposed in the White Paper on Antitrust Damages Actions. This is likely partly explained by the reactions of stakeholders to the Failed Draft Directive, and probably by lobbying on the part of businesses. It is recalled that some of the measures (e.g. collective actions) excluded from the Draft Directive on Antitrust Damages Actions were already criticized in the consultation on the White Paper, although they were included in the Failed Draft Directive. Also, it should not be forgotten that the Competition Commissioner changed in 2010 (Commissioner Joaquín Almunia replaced Commissioner Neelie Kros), which might have had an influence on the final draft. Moreover, as will be analyzed below, the Draft Directive proposed by the Commission has also been subject to a number of amendments in the European Parliament. The Parliament adopted the Directive on Antitrust Damages Actions on April 17th 2014 after negotiating its content with the Council, but the Directive still requires the final approval of the Council. Given that the Directive has to be adopted in the ordinary legislative procedure, the will of both the Parliament and the Council has shaped its content.

In comparing the Draft Directive on Antitrust Damages Actions to the Failed Draft Directive, the aim of the former is to ensure the effective enforcement of the EU competition rules by optimizing the interaction between public and private enforcement of competition law and ensuring that victims of EU antitrust violations can obtain full compensation for the harm that they have suffered.⁹²⁷ It therefore highlights the compensatory function of antitrust damages actions, an approach for which the Failed Draft Directive had already found practically full support amongst stakeholders. But the Failed Draft Directive did recognize that more effective damages actions would also

⁹²⁷ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 2-3.

result in a deterrent effect.⁹²⁸ Conversely, measures having a clearer potential deterrent effect, such as opt-out class actions and punitive damages, have been excluded from the new Directive on Antitrust Damages Actions, which demonstrates that the Union legislator does not intend antitrust damages actions to specifically pursue an objective of deterrence. Moreover, after the amendments introduced by the European Parliament, the specific objectives of the Directive include the establishment of rules concerning damages actions for infringements of EU competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers.⁹²⁹

As to the scope and specific measures proposed, the Failed Draft Directive contained provisions relating to collective redress, disclosure of evidence, passing-on defense, effect of national decisions, fault, and limitation periods. Conversely, the Draft Directive on Antitrust Damages Actions proposed by the Commission specifically stated that it should not require the Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU.⁹³⁰ Similarly, it did not contain any rules on the fault requirement. It also modified the rules suggested in the Failed Draft Directive relating to disclosure of evidence, passing-on defense, effect of national decisions, and limitation periods,⁹³¹ which have further been amended by the Parliament in the first reading of the Draft Directive.⁹³² On the other hand, the Directive on Antitrust Damages Actions includes provisions regarding consensual dispute resolution, something which was not foreseen by the Failed Draft Directive.⁹³³

Moreover, the harmonized rules will not only apply to damages actions for breaches of EU competition rules, but also breaches of national competition rules when they are

⁹²⁸ Explanatory Memorandum on the Failed Draft Directive, at p. 3-4.

⁹²⁹ Recital 49 of the Directive on Antitrust Damages Actions.

⁹³⁰ Recital 11 of the Draft Directive on Antitrust Damages Actions.

⁹³¹ These modifications will be examined in the following sections of this chapter.

⁹³² See the amended text available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

⁹³³ It only highlighted the usefulness of consensual dispute resolution and that parties on behalf of which representative actions are brought should be able to effectively use them. See Recital 10 of the Failed Draft Directive.

applied in parallel with Articles 101 and 102 TFEU.⁹³⁴ The Commission justified this modification by the need for legal certainty and a level playing field in the internal market, which requires that the same rules must apply to breaches of EU competition rules and national competition rules if these rules are applied in parallel.⁹³⁵ This extended scope has implications for the legal basis of the Directive.

The Failed Draft Directive was based on Article 103 TFEU [ex Article 83 EC] as its objective was to give effect to the principles laid down in Articles 101 and 102 TFEU by defining the relationship between national rules on civil liability and the application of Articles 101 and 102 TFEU. This was considered necessary because the unequal level of judicial protection of the Union right to damages for antitrust violations between Member States despite the fact that Articles 101 and 102 TFEU are public order rules that affect trade between Member States and the functioning of the internal market and the competitive environment for undertakings.⁹³⁶ Measures at Union level were deemed necessary since individual initiatives at national level could increase the existing differences and the negative effects of forum shopping, as well as result in unequal protection for victims. The proposal was considered to comply with the principle of subsidiarity⁹³⁷ as its objectives could not be sufficiently achieved by the Member States. Similarly, it was deemed to only include the measures necessary to comply with its objective (i.e. ensuring effective redress for obtaining full compensation of victims) and imposing costs on undertakings and citizens proportionate with this objective, thereby also complying with the principle of proportionality.⁹³⁸

However, the Failed Draft Directive did not take into account situations in which the conduct constitutes a breach of both EU competition rules and national competition rules. In such cases, a damages claim relating to the same conduct could be brought on the basis of EU competition law as well as national competition law. This situation has nevertheless been taken into account in the new Directive on Antitrust Damages Actions, which is based both on Articles 103 and 114 TFEU. The Commission has

⁹³⁴ Recital 10 of the Directive on Antitrust Damages Actions.

⁹³⁵ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 10.

⁹³⁶ *Ibid.*, at p. 5-6.

⁹³⁷ Article 5(3) TEU.

⁹³⁸ Explanatory Memorandum on the Failed Draft Directive, at p. 6.

justified this dual legal basis by the fact that the Directive pursues two objectives: giving effect to the principles laid down in Articles 101 and 102 TFEU and ensuring a more level playing field for undertakings operating in the internal market, as well as facilitating the enforcement by citizens and undertakings of rights derived from the internal market.⁹³⁹ Given that the Directive will also alter the applicable national rules concerning the right to bring damages actions for infringements of national competition rules when they are applied in parallel to the EU antitrust rules and therefore goes beyond giving effect to Articles 101 and 102 TFEU, Article 103 TFEU alone was not deemed as the proper legal basis for the Directive, but it had also to be based on Article 114 TFEU.⁹⁴⁰ The Parliament and Council did not change the legal bases for the Directive, but it has been adopted based on Articles 103 and 114 TFEU according to the ordinary legislative procedure.⁹⁴¹

As to the correctness of the legal bases chosen, it should first be noted that Article 103 TFEU indeed empowers the Council to lay down the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Although the provision does not expressly provide for the harmonization of national procedural rules, an extensive interpretation of it based on the need for an effective and more efficient application of Articles 101 and 102 TFEU in the European Union would be justified since the private enforcement of the prohibitions laid down in these articles is currently not as effective as would be desirable.⁹⁴² Given the need for an increased effect of these provisions by means of a legislative instrument at Union level, the adoption of the Directive on Antitrust Damages Actions on the basis of Article 103 TFEU is justified.

Second, it has to be analysed whether the Directive had to be adopted based on both Articles 103 and 114 TFEU since it also harmonizes certain national rules concerning the right to bring damages actions for infringements of national competition rules when

⁹³⁹ Recital 49 of the Directive on Antitrust Damages Actions.

⁹⁴⁰ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 10.

⁹⁴¹ Although formal acceptance by the Council is still required, the content of the Directive is the result of negotiations between the Council and the European Parliament.

⁹⁴² See also Chapter Three of the thesis regarding the obstacles to private enforcement in the Member States.

the infringement affects trade between Member States and those national rules are applied in parallel to the EU competition rules. The Commission contended in its proposal that the aim of the Directive is also wider than giving effect to Articles 101 and 102 TFEU because it aims to address the uneven playing field for antitrust damages actions, which are the result of discrepancies between national rules and make undertakings subject to different levels of risk of being held liable for antitrust violations depending on in which Member State they are established. Therefore, without harmonizing the rules applicable to breaches of Articles 101 and 102 TFEU and national competition rules when they are applied in parallel to the EU rules, the current situation risks to lead to an appreciable distortion of the the internal market.⁹⁴³

Admittedly, the harmonization of the national rules concerning the right to bring damages actions for infringements of *national* competition rules goes beyond merely giving effect to Articles 101 and 102 TFEU, although the issue is closely link to the need to apply the same rules in the same procedure in order to ensure legal certainty. However, it must be borne in mind that Article 114 TFEU is a residual provision and, hence, may only be applied when there are no other, more specific Treaty provisions that could serve as a legal basis. If there is a doubt with respect to which one of two possible legal bases is the correct legal basis, the Court of Justice has held that regard should be had to the nature, aim, and content of the act in question.⁹⁴⁴ If the measure would still be concerned with several areas of the Treaty, the measure in question might have to satisfy the requirements of two Treaty Articles.⁹⁴⁵

The use of Article 114 TFEU is also limited to situations where its objective is indeed the elimination of competition distortions. In other words, the adopted measure must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. Conversely, the mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition due to those disparities is not sufficient.⁹⁴⁶

⁹⁴³ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 9-10.

⁹⁴⁴ See for instance Judgment in *Commission v Council*, C-300/89, EU:C:1991:244, paragraph 10 and CRAIG, P. and DE BÚRCA, G., *EU Law. Text, Cases and Materials*, 5th edition, Oxford, 2011, at p. 590.

⁹⁴⁵ Judgment in *Commission v Council*, C-165/87, EU:C:1988:458.

⁹⁴⁶ Judgment in *Germany v European Parliament and Council*, C-376/98, EU:C:2000:544, paragraph 84.

The measure adopted must thus in fact pursue the objectives stated by the Union legislature,⁹⁴⁷ and any distortion of competition must be appreciable.⁹⁴⁸

Given the current discrepancies between national rules governing antitrust damages actions, when an anti-competitive conduct has effect on trade between Member States, the outcome of a damages action related to that infringement will vary depending on in which Member State the claim is brought. Common rules are therefore a necessity in order to achieve a level playing field in the EU. Moreover, if national competition rules are applied in parallel to the EU antitrust rules to the conduct in question, but only the rules applicable to a damages action based on EU competition law are harmonized, the same action would be subject to different procedural rules in cases of parallel application of the EU and national competition rules, which would complicate the examination of the case and jeopardize legal certainty. This would infringe the principle of equal treatment, since claimants and defendants who are in a similar situation should be treated in a similar manner regardless of whether EU or national law is being applied, if their content is essentially the same.⁹⁴⁹ In addition, the discrepancies concerning rules governing antitrust damages actions are significant: by way of example, some Member States provide for collective actions for damages while others do not.⁹⁵⁰ Similarly, some legal systems provide for “pre-trial discovery”, whereas in other legal systems the claimant must present evidence of the competition infringement without having access to this means rendering it much more difficult for it to prove the infringement and to obtain compensation for the loss that it has suffered.⁹⁵¹ Undertakings in countries where the procedural conditions governing antitrust damages actions make it more difficult for victims to obtain damages might also be encouraged to continue their anti-competitive practices, thus distorting the competition in the internal market.

⁹⁴⁷ Judgment in *Germany v European Parliament and Council*, EU:C:2000:544, paragraph 85.

⁹⁴⁸ Judgment in *Germany v European Parliament and Council*, EU:C:2000:544, paragraph 106.

⁹⁴⁹ See VAN GERVEN, W., “Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts”, in EHLERMANN, C-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001 Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oregon, 2003, p. 53-89, at p. 81-82. Especially the content of Article 101 TFEU and its national equivalents has largely been approximated in the last decade following the modernization of the EU competition rules.

⁹⁵⁰ For instance, the United Kingdom, France and Italy do, while Germany does not. See Section 2.2.

⁹⁵¹ For instance, in the United Kingdom, parties have a general disclosure obligation which covers documents that they are relying on or which are either supporting or adversely affecting their case. See Civil Procedure Rules 1998 r. 31.6. On the contrary, for example the German Code of Civil Procedure does not contain any such general pre-trial discovery.

It is consequently evident that one of the objectives of the Directive on Antitrust Damages Actions is genuinely to eliminate appreciable distortions of competition in the internal market and to remove obstacles to its proper functioning. Considering its second objective of giving effect to Articles 101 and 102 TFEU, for which there is a more specific legal basis in the Treaty – but which is not appropriate to serve as a legal basis for the harmonization of national competition rules – it can be concluded that the legal bases of the directive are justified.

4.2. Disclosure of Evidence

4.2.1. Scope of and Limits on the Disclosure Obligation

The Directive on Antitrust Damages Actions provides for a minimum level of disclosure of evidence under certain circumstances,⁹⁵² which will signify a modification of the existing legislation on access to evidence in most Member States. The initial provision proposed by the Commission was essentially the same (with some minor modifications) as what the Failed Draft Directive provided. However, the disclosure obligation has been significantly amended during the ordinary legislative procedure, as will be explained below.

The Failed Draft Directive proposed disclosure of evidence building on the approach adopted in Directive 2004/48/EC on the enforcement of intellectual property rights,⁹⁵³ which was designed to guarantee in all Member States a minimum level of effective access in antitrust damages actions to the evidence necessary to prove the claims of victims of antitrust violations.⁹⁵⁴ The victim was to first present reasonably available facts and evidence demonstrating plausible grounds for having suffered harm as a result of an infringement of Article 101 or 102 TFEU by the defendant.⁹⁵⁵ It was considered not to create excessively costly disclosure obligations in the form of undue burdens for the parties concerned and risks of abuse. In order to respect the different legal traditions

⁹⁵² Article 5 of the Directive on Antitrust Damages Actions.

⁹⁵³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45–86.

⁹⁵⁴ Explanatory Memorandum of the Failed Draft Directive, at p. 7.

⁹⁵⁵ Article 7(1) of the Failed Draft Directive. Also the defendants were to be given the right to disclosure of evidence in antitrust damages actions.

of the Member States, the Failed Draft Directive required an order by a judge to impose the disclosure of evidence held by the other party or third parties, and subjected the disclosure obligation to strict and active judicial control with regard to its necessity, scope and proportionality. The aim was to respect the central function of the court seized with an action for damages in line with the existing majority tradition in the Member States.⁹⁵⁶

Therefore, disclosure was only to be ordered once the party requesting it had shown that the evidence in question was relevant to substantiate the claim or defense; had specified either pieces of that evidence or as precise and narrow categories of it as possible on the basis of reasonably available facts; and had demonstrated that it was unable to produce the evidence by applying reasonable efforts.⁹⁵⁷ These conditions were therefore the same as those suggested in the White Paper. The Failed Draft Directive also added further conditions for courts to consider in assessing the proportionality of the disclosure obligation. These included, in particular, taking into account the value of the claim; the likelihood that the addressee of the disclosure order had infringed Article 101 or 102 TFEU; the scope and cost of the disclosure (especially for third parties); and whether the evidence to be disclosed might contain confidential information, which should be protected to the greatest extent possible whilst ensuring the availability of relevant evidence in antitrust damages actions.⁹⁵⁸ In addition, it imposed an obligation to hear the addressee of the disclosure order before adopting a disclosure order, except in cases of particular urgency.⁹⁵⁹ The Failed Draft Directive also provided for a possibility of maintaining or introducing rules providing for wider disclosure of evidence.⁹⁶⁰

Moreover, the Failed Draft Directive laid down exceptions from the disclosure obligation,⁹⁶¹ and contained provisions on sanctions.⁹⁶² It imposed an obligation on

⁹⁵⁶ Explanatory Memorandum of the Failed Draft Directive, at p. 8.

⁹⁵⁷ Article 7(2) of the Failed Draft Directive.

⁹⁵⁸ Article 7(3) of the Failed Draft Directive.

⁹⁵⁹ Article 7(4) of the Failed Draft Directive.

⁹⁶⁰ Article 7(6) of the Failed Draft Directive.

⁹⁶¹ Article 8 of the Failed Draft Directive.

⁹⁶² Article 9 of the Failed Draft Directive.

Member States to ensure that national courts would not order the disclosure of corporate statements or settlement submissions.⁹⁶³ Also, national competition authorities should be able to request the court not to order disclosure if they had demonstrated that disclosure would undermine an ongoing investigation concerning an infringement of the EU competition rules.⁹⁶⁴ Full effect had also to be given to all legal privileges and other rights not to be compelled to disclose evidence based on existing EU rules.⁹⁶⁵ Sanctions were to be imposed on parties, their legal representatives and third parties if they failed or refused to comply with a court's disclosure order; destroyed evidence relevant to substantiate an antitrust damages action for which it had been invoked or a competition authority had started an investigation in relation to the infringement underlying such an action; failed or refused to comply with obligations imposed by a court order protecting confidential information; and abused the rights relating to disclosure of evidence provided for by the Failed Draft Directive, and evidence and information obtained thereunder.⁹⁶⁶ The sanctions imposed were to be effective, proportionate and dissuasive.⁹⁶⁷

The provisions of the Draft Directive on Antitrust Damages Actions in respect of disclosure of evidence were quite similar to those of the Failed Draft Directive, and it continued to build on the approach adopted in Directive 2004/48/EC on the enforcement of intellectual property rights. It introduced a minimum level of disclosure of evidence if the claimant has presented reasonably available facts and evidence showing plausible grounds for harm suffered from an antitrust violation.⁹⁶⁸ During the ordinary legislative procedure, the European Parliament added a requirement that a claimant in proceedings relating to an antitrust damages action who requests disclosure of evidence must present a "*reasoned justification*" containing reasonably available facts and evidence "*sufficient to support the plausibility of its claim for damages*".⁹⁶⁹ National courts can then order the defendant or third party to disclose the evidence. The evidence must be relevant in

⁹⁶³ Article 8(1) of the Failed Draft Directive.

⁹⁶⁴ Article 8(2) of the Failed Draft Directive.

⁹⁶⁵ Article 8(3) of the Failed Draft Directive.

⁹⁶⁶ Article 9(1) of the Failed Draft Directive.

⁹⁶⁷ Article 9(2) of the Failed Draft Directive.

⁹⁶⁸ Article 5(1) of the Draft Directive on Antitrust Damages Actions.

⁹⁶⁹ Article 5(1) of the Directive on Antitrust Damages Actions.

terms of substantiating the claim or defense and the party requesting disclosure of evidence must specify either pieces of this evidence or relevant categories of this evidence defined as precisely and narrowly as possible on the basis of reasonably available facts.⁹⁷⁰

The Draft Directive on Antitrust Damages Actions maintained the requirement that disclosure of evidence had also to be limited to that which was proportionate. It provided that there had to be effective measures to protect confidential information and to give full effect to legal privileges and other rights not to be compelled to disclose evidence.⁹⁷¹ Moreover, national courts could never order the disclosure of leniency corporate statements and settlement submissions.⁹⁷² Member States were also to provide for sanctions for failure or refusal to comply with a disclosure order, the destruction of relevant evidence, failure or refusal to comply with an obligation to protect confidential information, or abuse of the rights relating to disclosure of evidence.⁹⁷³

Nevertheless, the Draft Directive on Antitrust Damages Actions proposed by the Commission also contained some minor differences and some additions to the Failed Draft Directive. For example, in order to assess the proportionality of a request for disclosure of evidence, the Draft Directive on Antitrust Damages Actions no longer mentioned the value of the claim for damages as one of the criteria to take into consideration.⁹⁷⁴ It also did not provide for an obligation to hear the addressee of a disclosure order before the order was adopted, but merely restricted the possibility of imposing penalties for non-compliance with a disclosure order to an addressee who had been heard.⁹⁷⁵

However, the Directive on Antitrust Damages Act adopted by the European Parliament and the Council does substantially amend these provisions. As to the proportionality of a disclosure request, the only issues specifically included in the adopted directive are the

⁹⁷⁰ Article 5(2) of the Directive on Antitrust Damages Actions.

⁹⁷¹ Article 5(2) of the Draft Directive on Antitrust Damages Actions.

⁹⁷² Article 6 of the Draft Directive on Antitrust Damages Actions.

⁹⁷³ Article 8 of the Draft Directive on Antitrust Damages Actions.

⁹⁷⁴ Article 5(3) of the Draft Directive on Antitrust Damages Actions.

⁹⁷⁵ Article 5(6) of the Draft Directive on Antitrust Damages Actions.

following: national courts must consider the extent to which the claim or defense is supported by available facts and evidence justifying the requests to disclose evidence; the scope and cost of disclosure, especially for third parties concerned, also to prevent non-specific search of information which is unlikely to be of relevance for the parties in the procedure; whether the evidence contains confidential information, especially concerning third parties, and the arrangements for protection of such confidential information.⁹⁷⁶ Moreover, national courts must be able to order the disclosure of evidence concerning confidential information if they consider it relevant to the action for damages, but they must have effective measures to protect such information.⁹⁷⁷ Similarly, Member States must ensure that when national courts order the disclosure of evidence, they give full effect to applicable legal professional privilege under EU or national law.⁹⁷⁸ With regard to addressees of a disclosure obligation, the Directive reintroduces an obligation to give them an opportunity to be heard before a national court orders disclosure,⁹⁷⁹ which was already foreseen by the Failed Draft Directive, but which was limited in the Commission's proposal on a Draft Directive.

Another important difference between the Failed Draft Directive and the Draft Directive on Antitrust Damages Actions was the imposition by the latter of additional limits on disclosure of certain evidence from the file of a competition authority in order to ensure that more enhanced private enforcement would not have negative effects on the public enforcement of EU competition rules. Courts would only be able to order a disclosure of information prepared by a natural or legal person specifically for the proceedings of a competition authority or information drafted by the authority in the course of its proceedings after the competition authority has closed its proceedings.⁹⁸⁰ This Article has been entirely revised and amended by the adopted Directive on Antitrust Damages Actions. Therefore the following analysis will rather focus on the content of its provisions.

⁹⁷⁶ Article 5(3) of the Directive on Antitrust Damages Actions.

⁹⁷⁷ Article 5(6) of the Directive on Antitrust Damages Actions.

⁹⁷⁸ Article 5(5) of the Directive on Antitrust Damages Actions.

⁹⁷⁹ Article 5(7) of the Directive on Antitrust Damages Actions.

⁹⁸⁰ Article 6(2) of the Draft Directive on Antitrust Damages Actions.

The Directive on Antitrust Damages Actions imposes an obligation on national courts assessing the proportionality of a request for disclosure of information included in the file of a competition authority to consider whether it has been formulated specifically with regard to the nature, object or content of documents submitted to a competition authority or held in its file; whether the request is in relation to an action for damages before a national court; and the need to safeguard the effectiveness of public enforcement of competition law.⁹⁸¹ In assessing the proportionality of a request for disclosure, the Directive highlights the need to prevent so-called fishing expeditions, where requests for non-specific information are made in the hope of discovering which documents form part of the file of a competition authority and thereby gain insight into the investigation strategy of that authority.⁹⁸² This is why such requests should be deemed disproportionate, and there must always be an obligation on the party requesting disclosure to specify the evidence or at least categories of evidence. Moreover, certain categories of evidence may only be disclosed after a competition authority has closed its proceedings: information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and settlements submissions that have been withdrawn.⁹⁸³ Leniency statements and settlements submissions cannot be subject to a disclosure order at any time.⁹⁸⁴ If a claimant presents a justified request, it may be granted access to these documents solely in order to ensure that their contents fulfil the description given in Article 4 (1) (16) and 4 (19) (18) regarding leniency statements and settlements.⁹⁸⁵ In addition, it should be noted that disclosure of evidence from a competition authority should only be ordered if it cannot be reasonably obtained from another party or a third party.⁹⁸⁶

⁹⁸¹ Article 6(4) of the Directive on Antitrust Damages Actions.

⁹⁸² Recital 20-21 of the Directive on Antitrust Damages Actions.

⁹⁸³ Article 6(5) of the Directive on Antitrust Damages Actions.

⁹⁸⁴ Article 6(6) of the Directive on Antitrust Damages Actions.

⁹⁸⁵ Article 6(7) of the Directive on Antitrust Damages Actions.

⁹⁸⁶ Recital 26 of the Directive on Antitrust Damages Actions.

The rest of the requested documents, which are not protected by the provisions laid down in Article 6 of the Directive, can be subject to disclosure orders at any time.⁹⁸⁷ National courts must also be able to request the disclosure of evidence from the competition authority if a party or third party is unable to or cannot reasonably provide the evidence requested.⁹⁸⁸ Through the amendments relating to disclosure of evidence included in the file of a competition authority made during the ordinary legislative procedure, the Directive on Antitrust Damages Actions aims to protect the effectiveness of public enforcement so as to avoid that information necessary to incentivize leniency applications and settlement submissions will be used in antitrust damages actions related to the same infringement.⁹⁸⁹ Furthermore, the EU legislator wishes to ensure that information obtained thanks to a disclosure order would not affect negatively on-going investigations of competition authorities by sensitive information ending in the hands of persons for whom they were not intended.

Nevertheless, it should be noted that the provisions on disclosure of evidence included in the file of a competition authority will not affect the rules and practices on public access to documents under Regulation 1049/2001,⁹⁹⁰ or the rules and practice under EU or national law on the protection of internal documents of competition authorities and correspondence between competition authorities.⁹⁹¹ But to date the Commission has interpreted requests based on Regulation 1049/2001 relating to competition proceedings restrictively.⁹⁹²

In addition, it is recalled that under Article 15(1) of Regulation 1/2003, national courts may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of the EU competition rules. The claimants themselves do not have a right to directly do so (unless the national procedural rules

⁹⁸⁷ Article 6(9) of the Directive on Antitrust Damages Actions.

⁹⁸⁸ Article 6(10) of the Directive on Antitrust Damages Actions. The competition authority may submit observations to the national court before whom a disclosure order is sought. *See* Article 6(11) of the Directive.

⁹⁸⁹ Recital 24 of the Directive on Antitrust Damages Actions.

⁹⁹⁰ Regulation 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L* 145, 31.5.2001, p. 43-48.

⁹⁹¹ Article 6(2) and 6(3) of the Directive on Antitrust Damages Actions.

⁹⁹² *See* KELLERBAUER, M., “The recent case law on the disclosure of information regarding EU competition law infringements to private damages claimant”, *E.C.L.R.*, 2014, 35(2), p. 56-62, at p. 57.

provide for this possibility), but they may encourage the court to request the Commission to provide information needed in the antitrust damages action. But such requests for information are only useful once the claimant has been able to gather sufficient evidence to merit bringing the antitrust damages action in the first place. Moreover, it will depend on the national courts whether they will make such a request, which might encourage forum shopping concentrated to those jurisdictions where the national courts more easily request transformation of information.⁹⁹³ The new rules on disclosure will therefore serve to reduce such national divergences, although the Directive also imposes important limits on what type of information the courts can order to be disclosed.⁹⁹⁴ Thus, its contribution to enhancing private enforcement actions may be limited.

Furthermore, the *use* of evidence obtained solely through access to the file of a competition authority is limited. Leniency statements and settlement submissions which are obtained by a natural or legal person solely through access to the file of the competition authority will either be considered inadmissible in damages actions or will be protected under the national rules in order to ensure that the use of evidence is limited to that provided by Article 6(6) of the Directive.⁹⁹⁵ The same consequence applies to evidence falling within one of the categories listed in Article 6(5) which is obtained solely through access to the file of a competition authority until that competition authority has closed its proceedings.⁹⁹⁶ Other evidence which is obtained solely through access to the file of a competition authority can only be used in an antitrust damages action by that person (or the person who succeeded his rights).⁹⁹⁷

As to sanctions, they have been renamed to “penalties” in the Directive on Antitrust Damages Actions. National courts have to be able to effectively impose penalties on parties, their legal representatives and third parties if they failed or refused to comply with a court’s disclosure order; destroyed evidence; failed or refused to comply with obligations imposed by a national court order protecting confidential information; or

⁹⁹³ *Ibid.*, at p. 60-62.

⁹⁹⁴ See Article 6 of the Directive on Antitrust Damages Actions.

⁹⁹⁵ Article 7(1) of the Directive on Antitrust Damages Actions.

⁹⁹⁶ Article 7(2) of the Directive on Antitrust Damages Actions.

⁹⁹⁷ Article 7(3) of the Directive on Antitrust Damages Actions.

breached the limits on the use of evidence provided for by the directive.⁹⁹⁸ The main difference to the Failed Draft Directive is that the obligation to impose penalties is no longer limited to those who have abused the rights relating to disclosure of evidence provided for by the directive and evidence and information obtained thereunder, but the mere fact that such a person has breached the limits of the use of evidence is sufficient to warrant the imposition of penalties.

4.2.2. Critical Assessment

Overall the introduction of a disclosure obligation of evidence – albeit a minimum obligation – is a very welcome legislative development considering the information asymmetry which generally exists between the infringers of competition rules and their victims. Limited access to evidence is arguably one of the biggest obstacles to bringing antitrust damages actions and the possibility of requesting disclosure of such evidence should contribute to facilitating lodging damages claims, provided that other main obstacles (such as reducing the costs of damages actions and facilitating claims by consumers through collective redress mechanisms) are also properly addressed.

The minimum disclosure obligation does also not appear excessively costly, which could otherwise constitute an impediment to the well-functioning of the competition enforcement in the EU. Extensive disclosure obligations might result in significant costs for the parties concerned and, in some cases, also for third parties. In addition, the proceedings could be unduly delayed thus making it less attractive to bring antitrust damages actions in the first place. As the disclosure obligation will entail modifications to the legal traditions in most Member States, and an excessive disclosure obligation could have the aforementioned negative effects, it seems reasonable to start with a more modest reform of the rules concerning access to evidence and, if it proves not to help facilitating damages claims satisfactorily, then consider making the necessary adjustments when the Directive will be reviewed.⁹⁹⁹

However, although the provisions regarding disclosure of evidence represent a step in the right direction, there are still issues that need to be addressed. One of the notable

⁹⁹⁸ Article 8(1) of the Directive on Antitrust Damages Actions.

⁹⁹⁹ See Article 20 of the Directive on Antitrust Damages Actions.

difficulties with the approach adopted in the directive is that certain types of documents, namely leniency statements and settlements submissions, are entirely excluded from disclosure without any obligation to first conduct a proportionality test of whether they, or at least a part of the information contained in them, should be disclosed to the claimant in order to make the bringing of an antitrust damages action possible, especially when this would be impossible without access to some of that information.

The balancing of the needs of public and private enforcement, respectively, has been established by the Court of Justice in *Pfleiderer* and *Donau Chemie*. In the former ruling, the Court of Justice held that national courts must weigh the usefulness of leniency programs for detecting cartels against the contribution of damages actions for the maintenance of effective competition. The limits for refusing access to documents relating to a leniency procedure would largely be decided by the principles of equivalence and effectiveness in the absence of common EU rules.¹⁰⁰⁰ In the latter ruling, the Court of Justice confirmed the need to decide on a case-by-case basis whether disclosure is called for. It also seems to have tightened somewhat the possibilities of refusing access to documents relating to leniency proceedings by injured parties since access can only be refused if the disclosure of documents would *actually* undermine the effectiveness of leniency programs.¹⁰⁰¹ A mere possibility of doing so might no longer be sufficient in order to comply with EU case law. But by excluding leniency statements and settlement submissions from the scope of disclosure orders, the Directive modifies existing EU law.

Nevertheless, in practice, the principles laid down by the Court of Justice in its case law have been applied differently in different Member States. In the United Kingdom, in the *National Grid* ruling, the judge followed more closely the balancing test established in *Pfleiderer* by making a case-by-case analysis of whether proportionality and procedural fairness required the documents to be disclosed. He conducted a document-by-document review and considered whether the access to them was necessary in order to decide the case fairly, considering how difficult it could be for the claimant to access the information from other sources and how relevant it was for the claim. As a result, the

¹⁰⁰⁰ See Judgment in *Pfleiderer*, EU:C:2011:389, paragraph 30.

¹⁰⁰¹ See Judgment in *Donau Chemie*, EU:C:2013:366, paragraphs 47-48.

claimant was granted access to some of the information contained in the documents requested.¹⁰⁰² In Germany, the outcome was rather different since the court gave more importance to the wide exceptions to disclosure of information included in the investigation file of an authority which exist under German law, which provides that access to evidence may be refused if it will put the purpose of the investigation in another criminal proceeding at risk.¹⁰⁰³ Such proceedings also include proceedings in which an administrative fine may be imposed on the parties,¹⁰⁰⁴ i.e. the exception can also apply to investigations by the competition authorities. Following the *Pfleiderer* ruling, the German court held that the leniency applicants' interests prevailed over the claimant's interest, and rejected the request to access the leniency material.¹⁰⁰⁵ This shows that the context of the national legal systems and procedural rules play a significant role in how national courts decide requests for disclosure of evidence. In the United Kingdom, the rules are more generous and, therefore, it is easier to assess individually the pieces of information contained in the documents in question.¹⁰⁰⁶

As a result, the Directive on Antitrust Damages Actions should include provisions enabling the national courts to genuinely consider the implications of granting or refusing the request of disclosure of evidence for both public and private enforcement. In the current Directive the focus is rather on protecting public enforcement more than necessary at the cost of private enforcement. Arguably, a more balanced approach would be called for in order to ensure that private enforcement could serve as an important complement to public enforcement, and not merely play a rather residual role as damages actions are concerned. Nevertheless, more guidance would be needed on how to reconcile public and private enforcement as the Court of Justice has only given

¹⁰⁰² *National Grid* [2012] EWHC 869. However, it should be noted that the documents in question only quoted from the corporate statements and were not themselves corporate statements.

¹⁰⁰³ Section 406(e)(2) of the German Code of Criminal Procedure.

¹⁰⁰⁴ Section 46(1) of the German Act on Regulatory Offences (Gesetz über Ordnungswidrigkeiten).

¹⁰⁰⁵ Court of First Instance of Bonn, Case 51/Gs 53/09 AG v *Bundeskartellamt*, Judgment of January 18th, 2012. It has been submitted that the emphasis of the German case law has been on the importance of protecting the leniency program by generally protecting leniency statements. See KUMAR, SIGNH, A., "Pfleiderer: assessing its impact on the effectiveness of the European leniency programs", *E.C.L.R.*, 2014, 35(3), p. 110-123, at p. 114-115, and HARSDORF ENDERNDORF, N., "The Road after Pfleiderer: Austrian preliminary reference raises new questions on access to file by third parties in cartel proceedings", *E.C.L.R.*, 2013, 34(2), p. 78-83, at p. 78.

¹⁰⁰⁶ See GUTTUSO, L., "The enduring question of access to leniency materials in private proceedings: one draft Directive and several court rulings", *G.C.L.R.* 2014, 7(1), p. 10-22, at p. 19.

very general indications about what national courts should take into consideration in deciding requests for access to information in leniency statements.¹⁰⁰⁷

Although leniency programs are important and a restricted liability of immunity recipients can be justified by ensuring the effectiveness of public enforcement, it does seem exaggerated to completely prohibit the disclosure of leniency statements and settlements submissions. Instead, the UK model of conducting a document-by-document review of leniency statements should be adopted, and both considerations of proportionality and procedural fairness should be taken into account. As stated in the Opinion of the Committee on Legal Affairs, given the importance of evidence for exercising the rights of appeal, the approach should be not to exclude any categories of documents *per se*, but an assessment of whether or not the documents in question should be disclosed, should always be possible.¹⁰⁰⁸ Moreover, different categories of documents contained in a leniency application may merit different level of protection. As one commentator has argued, in certain cases there are no justifications for denying access to leniency statements: this would be the case when the leniency applicant itself has revealed the content of its leniency application to a third party and other co-claimants request access to the statement.¹⁰⁰⁹ The UK Government has stated that disclosure should only encompass documents specifically created for the leniency process, but should exclude pre-existing documents.¹⁰¹⁰

In the case of settlement submissions, the need to ensure public enforcement of the competition rules is even less justified as they merely contribute to speed up the process of punishing the infringers since cartel members acknowledge their involvement in the

¹⁰⁰⁷ See SANDERS, M., JORDAN, E., DIMOULIS, C., SCHWEDT, K., DILUIGI, B. and VAN WISSEN, M., “Disclosure of leniency materials in follow-on damages actions: striking “the right balance” between the interests of leniency applicants and private claims?”, *E.C.L.R.*, 2013, 34(4), p. 174-182, at p. 175.

¹⁰⁰⁸ See Opinion of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 33.

¹⁰⁰⁹ See KOMNINOS, A.P., “*Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesaris*” in the 16th Annual Competition Law and Policy Workshop “Integrating public and private enforcement of competition law: Implications for courts and agencies”, European University Institute, Florence, June 17-18th, 2001, at p. 21.

¹⁰¹⁰ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 59.

cartel and their liability for it only after having seen the evidence in the Commission file. In return their fines will be reduced, but it is not warranted to in addition fully shield their settlement submissions from disclosure requests. Instead, the normal rules for assessing disclosure of evidence should apply. In other words, the national courts would have to examine if in a particular case the whole settlement submission or part of it should be protected because of the need to protect the effectiveness of public enforcement, or because the request is disproportionate or irrelevant to the damages claim.

During the legislative procedure, the Committee on the Internal Market and Consumer Protection also made an interesting suggestion that a provision guaranteeing the identity of a whistle-blower¹⁰¹¹ should be introduced in the Directive since the identity of the whistleblower is not relevant to the damage or the value of the damage.¹⁰¹² This provision has not been included in the adopted Directive, but admittedly it would be justified to protect the identity of the whistle-blower by refusing the disclosure of documents containing information which make it possible to identify the whistle-blower at least until the competition authority has been able to complete its investigation, if the whistle-blower has requested that its identity be kept confidential. This would contribute to equal protection at Union level as today the identity is protected under national law.

Moreover, particular attention should also be paid to the difficulty in assessing antitrust harm. As has been proposed by the Committee on Legal Affairs, claimants should also be able to obtain pre-litigation information from national or EU competition authorities

¹⁰¹¹ A whistleblower is an informant within an undertaking participating in a cartel, who reveals the existence of the cartel and the participation of the undertaking in that cartel to the competition authorities.

¹⁰¹² See Opinion of the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 57 and 77.

regarding the volume of damages or loss caused in order to facilitate fair settlements¹⁰¹³ and arguably also in order to bring antitrust damages actions.¹⁰¹⁴

4.3. Effect of National Decisions

The Draft Directive on Antitrust Damages Actions also proposed that final infringement decisions by NCAs would have a probative effect in subsequent damages actions as far as the finding of an infringement was concerned.¹⁰¹⁵ This probative effect of final NCA decisions was already envisaged in the Failed Draft Directive,¹⁰¹⁶ which in turn essentially built on the proposal in the White Paper.¹⁰¹⁷ The idea was to give the final decisions of the NCAs the same effect as Commission Decisions enjoy under Article 16(1) of Regulation 1/2003. In other words, as far as the *existence* of an infringement of Article 101 or 102 TFEU is concerned, in deciding an antitrust damages action relating to the infringement in question, the national courts would be bound by final decisions by NCAs or by review courts. The Commission also proposed that the same probative effect would be extended to decisions establishing that national competition rules had been infringed if the EU and national competition rules were applied in parallel in the same damages action. In this manner, legal uncertainty could be avoided and no unnecessary resources would be dedicated to re-litigating the issue of whether the EU antitrust rules had been infringed, and both courts and parties would save costs.¹⁰¹⁸ Instead, the court proceedings would focus on establishing that the claimant had indeed suffered harm as a result of the antitrust violation and the extent of the damage suffered. In any case, national courts would remain free to refer questions for a preliminary ruling to the Court of Justice under Article 267 TFEU should they have any doubt regarding the compliance of the national decisions with EU law. Finally, the Commission

¹⁰¹³ See Opinion of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 32.

¹⁰¹⁴ Article 17 of the Directive merely provides that a NCA must be able, if it considers it appropriate, to assist the national court in the assessment of the amount of damages upon request of that court.

¹⁰¹⁵ Article 9 of the Draft Directive on Antitrust Damages Actions.

¹⁰¹⁶ Article 12 of the Failed Draft Directive.

¹⁰¹⁷ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 43-45.

¹⁰¹⁸ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 15-16 and Recital 25 of the Draft Directive on Antitrust Damages Actions.

emphasized that the rights of defense of undertakings would be protected under Article 48(2) of the Charter of Fundamental Rights of the European Union.¹⁰¹⁹

However, the probative effect of final NCA decisions (regarding findings of an infringement of the EU antitrust rules and/or the national competition rules) was limited by the European Parliament and the Council. Therefore, the adopted Directive on Antitrust Damages Actions only grants such effect to final decisions by NCAs or review courts when the action for damages is brought in the Member State where the decision has been given. The binding effect will only cover the nature of the infringement and its material, personal and territorial scope.¹⁰²⁰ If the antitrust damages action is brought in a Member State other than that where the decision originates, it must only be taken into account as *prima facie* evidence of the existence of an infringement of Article 101 or 102 TFEU (although courts may arguably grant it higher probative effect), and it is also possible for the courts to assess it together with any other evidence adduced by the parties.¹⁰²¹

The advantage of the final provision is that the binding effect of NCA decisions will in the future also apply to infringements of national competition law, and not merely decisions concerning breaches of Articles 101 and 102 TFEU. On the other hand, a decision by a NCA of another Member State must no longer be given full probative effect, but is to be considered at least as *prima facie* evidence. This means that the issue of the existence of an infringement of competition law might have to be re-litigated when a claim for damages is brought before the court of another Member State, thus leading to a waste of time and resources, and increasing the costs of the action. Ultimately, this would however depend on the rules of the Member State in question as it may grant such binding effect anyway as is the case in Germany.¹⁰²²

¹⁰¹⁹ Charter of Fundamental Rights of the European Union, *OJ C* 326, 26.10.2012, p. 391–407.

¹⁰²⁰ Recital 31 of the Directive on Antitrust Damages Actions.

¹⁰²¹ Article 9 of the Directive on Antitrust Damages Actions.

¹⁰²² See Section 33(4) of the German Act Against Restraints of Competition. As stated, this provision was criticized by the Monopolies Commission since the addressees of the decision are the only ones that can appeal the decision and, therefore, the binding effect should be limited to them. See MONOPOLKOMMISSION, “*Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*”, Sondergutachten der Monopolkommission gemäss § 44. Abs. 1 Satz 4 GWB, at p. 24.

There are some arguments supporting the limitation of the binding effect of these decisions. Affording probative effect to final decisions of a NCA from another Member State could result in delay of justice because the probative effect of NCA decisions of other Member State are not accepted. Anyone wishing to challenge the decision of a NCA would have to do so in the Member State where the NCA is located. In addition, the legal remedies have to be exhausted before that decision would produce the effects initially envisaged in the Draft Directive on Antitrust Damages Actions, thus leading to lengthy proceedings.¹⁰²³ Moreover, Member States have adopted divergent approaches, for instance, regarding legal privilege and the scope of judicial review of NCA decisions,¹⁰²⁴ which could render it difficult for national courts to accept the binding effect of decisions adopted by foreign NCAs.

Finally, such a binding effect for administrative decisions could be difficult to justify if compared to judgments of national courts, the recognition of which in another Member State can be refused on the grounds of lack of sufficient notice of a claim to the defendant in respect of judicial proceedings.¹⁰²⁵ But even in such cases, the national court could not give binding effect to a decision of a foreign NCA if that would breach Article 6 of the European Human Rights Convention (“ECHR”)¹⁰²⁶ or Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. In order to remedy these types of problems related to extending the binding effect of a NCA decision to civil proceedings brought in other Member States, one commentator has suggested that recognition “*must depend on compliance with the requirements of a fair trial by the NCA in the country of origin*” and should also consider whether possible geographical

¹⁰²³ See BASEDOW, J., “Recognition of Foreign Decisions within the European Competition Network” in BASEDOW, J., FRANCO, S. and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 393-402, at p. 397.

¹⁰²⁴ See WISKING, S. and DIETZEL, K., “European Commission finally publishes measures to facilitate competition law private actions in the European Union”, *E.C.L.R.*, 2014, 35(4), p. 185-193, at p. 191.

¹⁰²⁵ Article 34(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 012, 16.1.2001, p. 1-23 (“Brussels I Regulation”). This regulation will be replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 351, 20.12.2012, p. 1-32 (“Brussels I bis Regulation”), Article 45(1)(b) of which contains the possibility of refusing recognition of a foreign judgment if a defendant has not been given sufficient notice of a claim in order to prepare its defense. For further details on this possibility, see FERNÁNDEZ ROZAS, J.C., and SÁNCHEZ LORENZO, S., *Derecho Internacional Privado*, 7th Edition, Civitas, 2013, at p. 240-249.

¹⁰²⁶ Available at www.echr.coe.int/ECHR.

limitations of the NCA decision (i.e. it was limited to an investigation of the market in the Member State of the NCA) removes its relevance for the damages claim.¹⁰²⁷ Instead, a rebuttable presumption of binding effect is suggested.

In deciding on whether NCA decisions from another Member State should have binding effect considering the issues outlined above, it should be borne in mind that for consumers follow-on actions will in practice be the only viable way (and often not even this will be feasible, unless there are some form of collective redress mechanisms available). Therefore, even if a final decision were required, affording probative effect to a NCA decision or a decision by a competition court of another Member State would still improve their possibilities of bringing a claim for damages as otherwise they would have to demonstrate the existence of the antitrust violation themselves. Consequently, final NCA and competition court decisions should be given a presumptive binding effect also in civil proceedings before the courts of other Member States, which the defendant could rebut in case it would breach the requirements of fair trial, or the geographical scope of the infringement would make it irrelevant with regard to the damages claim in relation to the market in the Member State in which it is brought. In addition, it could be possible to rebut the presumption of binding effect if there were manifest errors of facts in the investigation.¹⁰²⁸

4.4. Limitation Periods

The Directive on Antitrust Damages Actions provides that it is for the Member States to establish the rules applicable to limitation periods for bringing antitrust damages actions for infringements of Articles 101 and 102 TFEU and the national competition rules where they are applied in parallel to the EU competition rules. But the rules must at least lay down the moment from which the limitation period starts to run, the duration of the limitation period, and the circumstances under which it is interrupted or

¹⁰²⁷ BASEDOW, J., “*Recognition of Foreign Decisions within the European Competition Network*” in BASEDOW, J., FRANCQ, S. and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, Oxford and Portland, Oregon, 2012, p. 393-402, at p. 397 and 401-402.

¹⁰²⁸ This last possibility was proposed in the report of the European Parliament’s Committee on Economic and Monetary Affairs. See EUROPEAN PARLIAMENT’S COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, Draft report on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)), 3.10.2013, at p. 36.

suspended.¹⁰²⁹ Furthermore, the limitation period must be at least five years from the moment when a victim became aware of, or can reasonably be expected to have the knowledge of, the infringement of competition law; the harm it has caused him; and the identity of the infringer.¹⁰³⁰ Consequently, the Directive on Antitrust Damages Actions establishes a minimum duration for the limitation period, which was not specified in the Failed Draft Directive (or in the White Paper). On the other hand, the current Directive also allows Member States to maintain or introduce absolute limitation periods that are generally applicable, as long as their duration does not render practically impossible or excessively difficult the exercise of the right to full compensation.¹⁰³¹

The Draft Directive on Antitrust Damages Actions also provided that the limitation period for a continuous or repeated infringement could not start to run before the day on which the infringement would cease,¹⁰³² but this provision was deleted during the ordinary legislative procedure.¹⁰³³ Possibly it was considered to be sufficient that Article 10(2) provides that the limitation period should not begin to run before the infringement ceases, although it would have been preferable to maintain a specific provision for continuous and repeated infringements for the sake of clarity.

Pursuant to the Directive on Antitrust Damages Actions, the limitation period for a follow-on action must be suspended until at least one year after the decision by the competition authority in question is final or proceedings are otherwise terminated.¹⁰³⁴ This is also a modification of the two-year minimum limitation period for follow-on actions provided by the Failed Draft Directive.¹⁰³⁵ It is likely that the length has been reduced due to the fact that in follow-on actions there is no need to establish an infringement of the EU competition rules as it has already been established by the competition authority and, therefore, the claimant can focus on demonstrating the extent of the harm which it has suffered and the causal relationship between the infringement

¹⁰²⁹ Article 10(1) of the Directive on Antitrust Damages Actions.

¹⁰³⁰ Article 10(2) and 10(3) of the Directive on Antitrust Damages Actions.

¹⁰³¹ Recital 32 of the Directive on Antitrust Damages Actions.

¹⁰³² Article 10(3) of the Draft Directive on Antitrust Damages Actions.

¹⁰³³ See the amended text available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN>.

¹⁰³⁴ Article 10(4) of the Directive on Antitrust Damages Actions.

¹⁰³⁵ Article 14(3) of the Failed Draft Directive.

and the harm sustained. Nevertheless, this only applies if the damages claim is brought in the same Member States in which the competition authorities have established the existence of an antitrust violation or the Commission has adopted an infringement decision, since the Directive only extends the compulsory binding effect to these kinds of decisions. Consequently, in cases where the claim is brought before the courts of a Member State other than that where the decision originates, the reduction of the limitation period could be problematic. Ultimately this will nonetheless depend on what evidentiary value the courts of the Member States before which the antitrust damages claim is brought will grant the NCA decision.

The Directive on Antitrust Damages Actions has also added an obligation to suspend the limitation period for bringing an action for damages for the duration of the consensual dispute resolution process in order to provide injured parties with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before the national court. However, the limitation period will only be suspended with regard to those parties which are or were involved or represented in the consensual dispute resolution.¹⁰³⁶ The suspensive effect of consensual dispute resolution was not foreseen in the Failed Draft Directive, and reflects the emphasis on alternative dispute resolution which some of the stakeholders had called for in the legislative consultation process.¹⁰³⁷

In addition, the new Directive imposes an obligation on Member States to ensure that in cases where injured parties have not been able to obtain compensation from infringing undertakings other than the immunity recipient, the limitation period is reasonable and sufficient to allow victims to bring an antitrust damages action against the immunity recipient.¹⁰³⁸ The obligation, in principle, to claim damages from other infringing parties than the immunity recipient might require a longer limitation period than in other cases, since it would seem that the injured parties would have to first assess whether they could gather sufficient evidence against the co-infringers and only if they could not

¹⁰³⁶ Recital 44 and Article 18 of the Directive on Antitrust Damages Actions.

¹⁰³⁷ See e.g. Opinion of the Internal Market and Consumer Protection Committee on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at § 6.

¹⁰³⁸ Article 11(3) of the Directive on Antitrust Damages Actions.

substantiate a claim against them, could they try to bring a damages claim against the immunity recipient.

Establishing some common rules regarding limitation periods will contribute to increased legal certainty. It should also facilitate the bringing of damages claims especially in Member States the limitation periods of which are very short.¹⁰³⁹ In this context, the requirement that the victim must have knowledge of the infringement and the harm that it has caused it before the limitation period begins to run is crucial as otherwise the limitation period might have expired even before the victim learned about the infringement. But it is not easy to establish from what point in time the claimant *de facto* has such knowledge. This will require a case-by-case assessment, and it has been suggested that appropriate factors to consider would include the applicable standard of care regarding the existence of a claim, the individual characteristics of the claimant, and especially whether it is a legal or natural person. The scope of the necessary knowledge would also depend on the infringement as not all antitrust violations do necessarily produce effects in the market. Moreover, an additional difficulty is that the publicly available information about antitrust violations are often not very detailed and comprehensive,¹⁰⁴⁰ which makes it difficult for claimants to be certain that an antitrust violations has indeed been committed.

On the other hand, by only providing for a minimum limitation period, and requiring Member States to ensure that the limitation period for bringing a damages claim against an immunity recipient is reasonable and sufficient to enforce such claims, the Directive respects the principle of procedural autonomy. For situations not specifically regulated by the Directive, the limitation periods would therefore have to respect the limits established by the principles of equivalence and effectiveness.

¹⁰³⁹ See CRAIG, L., JAZRAWI, W., GARTAGANI, S., SIAKKA T. and FITZGERALD-FRAZER, K., “A summary of recent developments in antitrust damages claims, collective redress and funding in the EU and UK”, *G.C.L.R.*, 2013, 6(3), R41-R47, at R43.

¹⁰⁴⁰ SOYEZ, V., “The commencement of the subjective limitation periods in private competition litigation”, *G.C.L.R.*, 2013, 6(1), p. 7-11, at p. 8-11.

4.5. Joint and Several Liability

The Directive on Antitrust Damages Actions establishes that undertakings are jointly and severally liable for damage caused by their joint anti-competitive behavior.¹⁰⁴¹ This means that injured parties can bring a damages claim for full compensation against any of them. Such a right is in line with what is generally applicable in the Member States.¹⁰⁴²

Very recently, the Court ruled in *ÖBB-Infrastruktur*¹⁰⁴³ that the civil liability of cartel members also covers loss resulting from so-called umbrella pricing where an undertaking not party to the cartel sets higher prices having regard to the practices of the cartel than it would have under normal conditions of competition on the market. Cartel members should take into account that their cartel could have such possible effects the resulting loss of which they will be obliged to compensate, provided that the injured party can establish that the cartel was “*in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently*”.¹⁰⁴⁴ The injured party has thus a right to claim compensation for the loss suffered from the cartel members even if it did not have contractual links with them. As a result, in order to ensure the effectiveness of Article 101 TFEU, national legislation cannot categorically exclude civil liability of cartel members for the loss resulting from umbrella pricing by an undertaking not party to the cartel.¹⁰⁴⁵ On the other hand, the claimant must still prove that causal relationship between the loss that it has suffered and the cartel, which arguably is more challenging when it is not even indirect purchaser of a cartel member, but of an independent party. Among other things, the injured party would have to show foreseeability of the damage and attributability.

¹⁰⁴¹ Article 11(1) of the Directive on Antitrust Damages Actions.

¹⁰⁴² See CRAIG, L., JAZRAWI, W., GARTAGANI, S., SIAKKA T. and FITZGERALD-FRAZAR, K., “A summary of recent developments in antitrust damages claims, collective redress and funding in the EU and UK”, *G.C.L.R.*, 2013, 6(3), R41-R47, at R43.

¹⁰⁴³ Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317.

¹⁰⁴⁴ Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317, paragraph 34.

¹⁰⁴⁵ Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317, paragraphs 33 and 37.

However, the Directive on Antitrust Damages Actions limits the liability of certain small and medium-sized enterprises, provided that the right of victims to full compensation is not prejudiced. This limitation applies to SMEs the market share of which in the relevant market was below 5% during the competition infringement and the economic viability of which would be put at risk, and whose assets would lose all their value if the undertakings in question were held jointly and severally liable. Such undertakings must in principle only compensate their own direct and indirect purchasers. But they may only benefit from this restricted liability on the condition that they have not led the infringement or coerced other undertakings to take part in it.¹⁰⁴⁶ This limitation of liability of SMEs was introduced by the amendments made by the Parliament during the ordinary legislative procedure. No particular justification has been included in the recitals of the Directive, but it could be motivated by the fact that sometimes small market players have no choice but to join a cartel created by large undertakings in order to be able to continue their business activities without making significant losses. In such cases, it could be unreasonable if they had to pay damages which exceed their share of responsibility for the harm caused.

Furthermore, the issue of immunity from fines granted to leniency applicants has also been taken into consideration. Immunity recipients will only be jointly and severally liable to their direct or indirect purchasers or providers and, only exceptionally, to other injured parties if the victims cannot obtain full compensation from other co-infringers.¹⁰⁴⁷ It should be noted that the opinion of the Committee on Legal Affairs stated that leniency programs should not absolve infringers from paying damages to victims and proposed the deletion of this provision.¹⁰⁴⁸ Nevertheless, the reduced liability of immunity recipients has been justified by the importance which leniency programs play in uncovering secret cartels, and putting an end to such violations. If the immunity recipient were held jointly and severally liable, injured parties might choose to bring a damages claim against it instead of its co-infringers precisely because its cooperation with the competition authorities is likely to result in evidence proving its

¹⁰⁴⁶ Article 11(2) of the Directive on Antitrust Damages Actions.

¹⁰⁴⁷ Article 11(3) of the Directive on Antitrust Damages Actions.

¹⁰⁴⁸ See Opinion of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 32 and 51.

participation in the cartel in more detail (thanks to the leniency statement) than the participation of other participants, and the decision by a competition authority establishing the infringement could become final for the immunity recipient before it becomes final for the co-infringers,¹⁰⁴⁹ since it is not likely to appeal that decision.

The provisions governing liability are a novelty which could not be found in the Failed Draft Directive. They aim to restrict the liability of an undertaking which has been granted immunity, but can only do so to a limited extent since victims' right to full compensation must always be respected and, moreover, as the damages awarded are only single damages, the possibility of restricting the liability in damages is limited.

Finally, the new Directive also regulates the issue of contribution. An infringing undertaking may recover a contribution from any other co-infringing undertaking which corresponds to their relative responsibility for the harm caused by the antitrust violation. Again, the obligations of immunity recipients have been limited by restricting their amount of contribution to the amount of the harm they caused to their own direct and indirect purchasers or providers. With regard to harm caused to other injured parties, the determination of the amount of contribution of immunity recipients will depend on their relative responsibility for the harm.¹⁰⁵⁰

The provisions concerning joint and several liability of co-infringers make it possible for injured parties to choose to bring damages actions against the defendant most likely to be able to pay the compensation. From the claimants' point of view this simplifies litigation as they could obtain compensation for the whole harm suffered from one single defendant. It is also important to note that the claimants do not have to be direct customers of the defendant, but in line with *ÖBB-Infrastruktur*, as long as they can demonstrate that the defendant should have taken into regard that the anti-competitive conduct could result in the loss that the injured parties have suffered, the defendant could be held liable in civil damages. From the defendants' point of view this could result in uncertainty about whether it would be able to seek contribution from its co-infringers because some might no longer exist and the costs of determining the relative

¹⁰⁴⁹ Recital 34 of the Directive on Antitrust Damages Actions.

¹⁰⁵⁰ Article 11(4) of the Directive on Antitrust Damages Actions.

responsibility of each co-infringer for the harm caused to injured victims could be expensive.¹⁰⁵¹

The restriction established on contribution for immunity recipients is easier to accept than the limitation on liability as it relates to the internal distribution of responsibility for the harm caused by each cartel member. Therefore, in order to ensure the right to full compensation of victims of cartels, it is crucial that the Directive provides that the limited liability of immunity recipients only applies in case the injured parties are able to claim damages from other cartel members. For the same reason, it is also appropriate that the limited civil liability has not been extended to other leniency applicants than immunity recipients.

4.6. Passing-on of Overcharges

The Directive on Antitrust Damages Actions contains several provisions regarding the so-called passing-on of overcharges where a party which has paid an overcharge due to an antitrust violation passes on that overcharge to the next level in the distribution chain. As a result of the passing-on, that party might no longer have suffered harm from the infringement, provided that the entire overcharge has been passed on and the passing-on has not resulted in loss of profits in the form of decreased sales because of the increase in price of the goods sold or the services provided.

The Directive provides, on the one hand, that the right to full compensation must be ensured but, on the other hand, the compensation shall not be greater than the actual harm suffered by injured parties.¹⁰⁵² The consequence is that anyone who has suffered harm must be entitled to full compensation, as has already been established by the case law of the Court of Justice.¹⁰⁵³ In other words, both direct and indirect purchasers have a right to full compensation, which must include compensation for loss of profits.¹⁰⁵⁴ Similarly, victims who have supplied goods or services to the infringer will benefit from

¹⁰⁵¹ HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.* 2014, 35(2), p. 51-55, at p. 54.

¹⁰⁵² Article 12(1) of the Directive on Antitrust Damages Actions.

¹⁰⁵³ See Judgment in *Courage*, EU:C:2001:465, paragraph 24.

¹⁰⁵⁴ Article 12(3) of the Directive on Antitrust Damages Actions.

a right to compensation if they have suffered loss due to a competition infringement.¹⁰⁵⁵ The infringement could, for instance, have reduced the price that the supplier received for the supplies to the infringer.

In order to ensure that antitrust damages actions will not result in over-compensation of victims, national procedural rules must be established which ensure that compensation for actual loss corresponds to the overcharge suffered at the respective level in the distribution chain.¹⁰⁵⁶ National courts must also be given the power to estimate the amount of the overcharge which has been passed on.¹⁰⁵⁷ This is considered important in order to remedy the asymmetry of information.¹⁰⁵⁸ In addition, the Directive contains a new provision which urges the Commission to issue guidelines for national courts on how to estimate the amount of the overcharge, which was passed on to the indirect purchaser.¹⁰⁵⁹ The guidelines should be “*clear, simple and comprehensive*”.¹⁰⁶⁰ The Commission’s Practical Guide adopted on the same date as the Draft Directive on Antitrust Damages Actions includes guidance about this calculation.¹⁰⁶¹

In order to ensure that damages claims do not result in over-compensation, the new Directive allows the infringer to rely on passing-on defense, but it has the burden of proof that the claimant has actually passed on the overcharge.¹⁰⁶² This was already provided for by the Draft Directive on Antitrust Damages Actions,¹⁰⁶³ the Failed Draft Directive and the White Paper. However, the adopted Directive deleted the provision

¹⁰⁵⁵ Article 12(4) of the Directive on Antitrust Damages Actions.

¹⁰⁵⁶ Article 12(2) of the Directive on Antitrust Damages Actions.

¹⁰⁵⁷ Article 12(5) of the Directive on Antitrust Damages Actions.

¹⁰⁵⁸ See Opinion of the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 80.

¹⁰⁵⁹ Article 16 of the Directive on Antitrust Damages Actions.

¹⁰⁶⁰ Recital 37 of the Directive on Antitrust Damages Actions.

¹⁰⁶¹ Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

¹⁰⁶² Article 13 of the Directive on Antitrust Damages Actions.

¹⁰⁶³ Article 12 of the Draft Directive on Antitrust Damages Actions.

contained in Article 12(2) of the Commission’s proposal for a directive which aimed to limit the defendant’s possibility of invoking the passing-on defense in situations where the overcharge had been passed on to the next level in the distribution chain, and it would be “*legally impossible*” for injured parties to claim compensation. The justification for this elimination was, first, the difficulty in assessing such a “*legal difficulty*”. Second, legal obstacles making it legally impossible for indirect purchasers to claim compensation for harm suffered as a result of an antitrust violation would be incompatible with ECJ case law. In addition, the fear was that the wording in question could result in unjust enrichment or overcompensation of claimants.¹⁰⁶⁴ The Directive on Antitrust Damages Actions also adds a provision specifically allowing the defendant to require disclosure from the claimant and third parties when this can be held reasonable.¹⁰⁶⁵ Moreover, it restates the right to claim compensation for loss of profit in cases where the claimant’s sales were reduced as a result of the pass-on of the overcharge.¹⁰⁶⁶ For the sake of completeness and clarity, it would have been desirable that a reference to the right under EU law to interest¹⁰⁶⁷ would have been added in this context.

It should also be noted that the passing-on defense only applies to the overcharge which has been passed on to the next level in the distribution chain, but not to other types of harm which might have been caused, such as damage to a competitive market position. For these other types of harm, the defendant will have to contest the foreseeability and causation, which remain issues governed by national procedural rules even after the implementation for the Directive on Antitrust Damages Actions. As a result, national differences regarding these issues will continue to exist.¹⁰⁶⁸

¹⁰⁶⁴ See Opinion of the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 81.

¹⁰⁶⁵ Article 13 of the Directive on Antitrust Damages Actions.

¹⁰⁶⁶ Recital 35 of the Directive on Antitrust Damages Actions.

¹⁰⁶⁷ Judgment in *Manfredi*, C:2006:461, paragraph 95. However, it should be noted that the right to full compensation laid down in Article 2 of the Directive on Antitrust Damages Actions contains a general codification of the right to full compensation, including interest.

¹⁰⁶⁸ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.* 2014, 35(2), p. 51-55, at p. 54.

The burden of proof relating to passing-on is different in cases involving indirect purchasers claiming compensation for damages resulting from an overcharge which has wholly or partly been passed on to the claimant. Indirect purchasers must demonstrate the existence of such pass-on, although reasonable requests for disclosure from the defendant and third parties will be allowed.¹⁰⁶⁹ In order to satisfy the burden of proof, the indirect purchaser must have demonstrated that the defendant has committed an antitrust violation, which resulted in an overcharge for the direct purchaser of the defendant and he either purchased goods or services which were the subject of the antitrust violation or goods or services derived from or containing goods or services which were the subject of the violation.¹⁰⁷⁰ Nevertheless, if the defendant can credibly show that the overcharge has not, or not entirely, been passed on to the indirect purchaser, the damages claim is considered not to have been proven.¹⁰⁷¹

The Directive on Antitrust Damages Actions also attempts to avoid a multiple liability or an absence of liability of the infringer when antitrust damages actions are brought at different levels in the distribution chain. To this aim, national courts seized with a damages claim must, when they assess the burden of proof, be able to consider antitrust damages actions relating to the same infringement brought by claimants from other levels in the distribution chain, or judgments resulting from such actions. Moreover, they should take due account of relevant information in the public domain resulting from public enforcement cases.¹⁰⁷² In order to ensure that compensation for actual loss paid at any level in the distribution chain corresponds to the overcharge harm caused at that level, appropriate procedural means should be made available to national courts. National courts should, for instance, be able to join claims. These kinds of means should also exist in cross-border cases.¹⁰⁷³ However, these provisions of the Directive are not to prejudice the rights and obligations of national courts under Article 30 of the new Brussels Regulation¹⁰⁷⁴ to stay proceedings or decline jurisdiction in favor of the court

¹⁰⁶⁹ Article 14(1) of the Directive on Antitrust Damages Actions.

¹⁰⁷⁰ Article 14(2) of the Directive on Antitrust Damages Actions.

¹⁰⁷¹ Article 14(3) of the Directive on Antitrust Damages Actions.

¹⁰⁷² Article 15(1) of the Directive on Antitrust Damages Actions.

¹⁰⁷³ Recital 39 of the Directive on Antitrust Damages Actions.

¹⁰⁷⁴ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L* 351, 20.12.2012, p. 1-32. Currently the relevant article is Article of Brussels I Regulation.

first seized of the case.¹⁰⁷⁵ Similarly, the means available to national courts under national and EU law should not prejudice the fundamental rights of defense and to an effective remedy and fair trial of third persons to judicial proceedings, and the probative effect of related judgments.¹⁰⁷⁶

Allowing the passing-on defense could constitute an obstacle for antitrust damages actions, because indirect purchases and, especially consumers at the end of the distribution chain, will encounter large difficulties in proving the exact amount that has been passed on to them, particularly in situations involving several intermediaries. Although the possibility of making reasonable requests for disclosure from the defendant and third parties is allowed under Article 14(1) of the Directive on Antitrust Damages Actions and could facilitate obtaining information needed to assess the amount of the overcharge that has been passed on to consumers, this would probably not be sufficient to incentivize damages claims by consumers. The only way to try to mitigate the effects of a passing-on defense would be to ensure a possibility of consumers joining forces in a collective or representative action together with other consumers who have suffered a loss in order to be able to share the litigation costs.

4.7. Quantification of Harm

As to the quantification of harm, the Directive on Antitrust Damages Actions contains a rebuttable presumption of harm resulting from a cartel.¹⁰⁷⁷ This presumption is considered necessary because of the information asymmetry that usually exists between the parties and the difficulties in quantifying antitrust damages. Moreover, it would be difficult to ensure the effectiveness of antitrust damages actions in cartel cases due to the secretive nature of cartels, which renders it more difficult to adduce the evidence needed to prove the harm.¹⁰⁷⁸ The rebuttable presumption of harm caused by a cartel means that the party which has the necessary evidence in its possession (i.e. the infringer) must meet the burden of proof – in this case, to show that the cartel has

¹⁰⁷⁵ For more details on the issue of *lis pendens* and related actions under Brussels I and Brussels I bis Regulations, see FERNÁNDEZ ROZAS, J.C., and SÁNCHEZ LORENZO, S., *Derecho Internacional Privado*, 7th Edition, Civitas, 2013, at p. 93-99.

¹⁰⁷⁶ Recital 39 of the Directive on Antitrust Damages Actions.

¹⁰⁷⁷ Article 17(2) of the Directive on Antitrust Damages Actions.

¹⁰⁷⁸ Recital 42 of the Directive on Antitrust Damages Actions.

exceptionally not caused any harm – which in turn facilitates the task of claimants proving an antitrust damages action.

The presumption of harm has been criticized, since e.g. cartels of very short duration do not necessarily cause harm.¹⁰⁷⁹ However, it is submitted that it is very unlikely that any damages claims would be brought in such cases and, in any case, the defendants would always have the possibility of rebutting the presumption of harm if a damages action was brought. Therefore, it is justified to ease the burden of claimants to prove that the cartel has caused harm.

Although the Directive does not provide for a presumption regarding the scope of the harm, it provides that the burden and standard of proof required for the quantification of harm must also not be such as to make the bringing of antitrust damages actions virtually impossible or excessively difficult.¹⁰⁸⁰ In other words, they must comply with the principle of effectiveness. This is why national courts must be empowered to estimate the harm. Contrary to the Commission's initial proposal,¹⁰⁸¹ the possibility of estimating the amount of harm has been limited to situations where it has been established that a claimant has indeed suffered harm, but the precise quantification of that harm is virtually impossible or excessively difficult on the basis of available evidence.¹⁰⁸² As a result, usually the burden and level of proof applicable to the quantification of damages will depend on the national rules, and the Member States will enjoy great discretion in how to quantify harm.¹⁰⁸³

At the time-being, since there is no binding legislation at EU level, antitrust harm is quantified on the basis of national rules, which must comply with the principles of equivalence and effectiveness. The actual situation has to be compared with a hypothetical one, i.e. a situation that would have existed on the market, were it not for

¹⁰⁷⁹ See VANDENBORRE, I., HOFFMAN LENT, K. and GOETZ, T.C., "Actions for antitrust damages in the European Union: evaluating the Commission's Directive proposal", *G.C.L.R.*, 7(1), 2014, p. 1-9, at p. 5.

¹⁰⁸⁰ Article 17(1) of the Directive on Antitrust Damages Actions.

¹⁰⁸¹ Article 16(2) of the Draft Directive on Antitrust Damages Actions.

¹⁰⁸² Article 17(1) of the Directive on Antitrust Damages Actions.

¹⁰⁸³ See VANDENBORRE, I., HOFFMAN LENT, K. and GOETZ, T.C., "Actions for antitrust damages in the European Union: evaluating the Commission's Directive proposal", *G.C.L.R.*, 7(1), 2014, p. 1-9, at p. 5.

the competition infringement. Therefore, in order not to make the right to damages practically impossible or excessively difficult, the judge must be able to estimate the harm as the comparison can never be made with complete accuracy.¹⁰⁸⁴ In other words, the assessment is required in order to comply with the principle of effectiveness. Another novel provision which aims to facilitate the assessment of harm provides that national courts must also be able to request that competition authorities assist in determining the amount of damages in antitrust damages proceedings.¹⁰⁸⁵

An interesting model regarding the estimation of damages was proposed by the rapporteur of the Committee on the Internal Market and Consumer Protection, who proposed that the assessment of damages should be based on the victim's estimation. This would contribute to discouraging cartel participation since the cartel members would have less influence in court proceedings, while the victim's voice would be stronger.¹⁰⁸⁶ However, if the victim is to be given the power to estimate the damages, this would often require that the victim is assisted either by an expert in cartels, NCA or a law firm specialized in competition law. Otherwise the complex task of assessing the amount of harm suffered could result in unreasonable damages being awarded which do not reflect the real harm suffered. This could explain why the Parliament did not include this type of provision in the Directive.

The Failed Draft Directive hardly mentioned the quantification of damages, but this can be explained that it followed the suggestion contained in the White Paper to codify in a Union legislative instrument the definition of damages and to issue guidelines for calculation of antitrust damages.¹⁰⁸⁷ Article 2 of the adopted Directive codifies indeed that full compensation must include the compensation for actual loss, loss of profit and interest. Moreover, in June 2013, the Commission issued a communication accompanied by a Practical Guide on quantifying harm in actions for damages based on

¹⁰⁸⁴ Recital 41 of the Directive on Antitrust Damages Actions.

¹⁰⁸⁵ Article 17(3) of the Directive on Antitrust Damages Actions.

¹⁰⁸⁶ See Opinion of the Committee on the Internal Market and Consumer Protection on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 57.

¹⁰⁸⁷ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 58-59.

breaches of Article 101 or 102 TFEU.¹⁰⁸⁸ Although these measures are non-binding, it is still a positive development that the Directive has improved the assessment of harm by giving a greater role to national judges and making the involvement of competition authorities in the assessment of harm possible. This could at least somewhat facilitate the compensation especially of indirect purchasers and consumers which generally have the largest difficulties in proving the exact amount of harm that has been passed on to them.

But problems still remain. For instance, no common rules are provided for causation, remoteness or quantification of loss, so national divergences will prevail. Furthermore, the burden of proof and the standard of proof with regard to quantification of harm will largely be determined according to the national rules, which must respect the principles of equivalence and effectiveness. National courts will also have discretion to decide to what degree they will follow the non-binding guidelines for quantification of harm, so again the methods relied on may significantly vary from one Member State to another.¹⁰⁸⁹ It is also to be expected that economic evidence will prolong and make litigation more expensive.¹⁰⁹⁰

4.8. Consensual Dispute Settlement

The Directive on Antitrust Damages Actions also aims to encourage consensual dispute resolution by suspending the limitation period during the consensual dispute resolution process. This suspension will be restricted to those parties which are involved or represented in the dispute resolution process.¹⁰⁹¹ Similarly, Member States are to ensure that national courts may suspend antitrust damages proceedings in case the parties to

¹⁰⁸⁸ See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ C* 167, 13.6.2013, p. 19-21; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

¹⁰⁸⁹ See VANDENBORRE, I., HOFFMAN LENT, K. and GOETZ T.C., “Actions for antitrust damages in the European Union: evaluating the Commission’s Directive proposal”, *G.C.L.R.*, 2014, 7(1), p. 1-9, at p. 5.

¹⁰⁹⁰ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.* 2014, 35(2), p. 51-55, at p. 53.

¹⁰⁹¹ Article 18(1) of the Directive on Antitrust Damages Actions.

those proceedings are involved in consensual dispute resolution concerning the same damages claim.¹⁰⁹² However, national courts should also consider the interest in an expeditious procedure when they decide on a possible suspension of the procedure.¹⁰⁹³ Also, it should be noted that national law in matters of arbitration will not be affected by this possibility.¹⁰⁹⁴

The amendments made during the ordinary legislative procedure introduced a maximum limit for the suspension of antitrust damages proceedings to two years. Moreover, when competition authorities take a decision imposing a fine on infringers, they could take into account compensation paid as a result of a consensual settlement as a mitigating factor, provided that the compensation has been paid before the decision imposing the fine.¹⁰⁹⁵

Overall, the EU legislator considers settlements resolving definitely the issue of damages desirable because they reduce uncertainty both for infringers and victims. The settlements should strive to cover as many injured parties and victims as possible and could take different form: out-of-court settlements, arbitration, mediation, and conciliation are specifically mentioned in the Directive. The provisions adopted aim to increase the effectiveness of consensual dispute settlement resolution mechanisms and facilitate their use.¹⁰⁹⁶

The resolution of antitrust damages actions by ADR could raise some concerns about e.g. arbitrators or mediators not acknowledging an antitrust violation.¹⁰⁹⁷ However, in the EU, national courts are entitled to annul arbitral awards that infringe the EU competition rules.¹⁰⁹⁸ In other words, it would be possible to challenge arbitral awards which have disregarded the existence of an antitrust violation. By treating mediators similarly as arbitrators, the concerns about disregard of competition law could be

¹⁰⁹² Article 18(2) of the Directive on Antitrust Damages Actions.

¹⁰⁹³ Recital 45 of the Directive on Antitrust Damages Actions.

¹⁰⁹⁴ Article 18(2) of the Directive on Antitrust Damages Actions.

¹⁰⁹⁵ Article 18(3) and 18(4) of the Directive on Antitrust Damages Actions.

¹⁰⁹⁶ Recital 43 of the Directive on Antitrust Damages Actions.

¹⁰⁹⁷ See HÖFT, J.C., “Alternative dispute resolution in antitrust cases? On the role of mediation in US antitrust and EU and German competition law”, *E.C.L.R.*, 2013, 34(8), p. 434-442, at p. 441.

¹⁰⁹⁸ See Judgment in *Eco Swiss*, C-126/97, EU:C:1999:269, paragraphs 37-39.

addressed.¹⁰⁹⁹ However, if the victims are consumers, the costs of challenging a settlement based on mediation on the ground of the existence of an antitrust violation could deter them from seeking redress.

Finally, the claim of an injured party which settles is reduced with the settling co-infringer's share of the harm inflicted upon the injured party.¹¹⁰⁰ It is important to note that the whole share of harm of the settling co-infringer is reduced irrespective of whether or not the amount of the settlement is the same as its share of the harm. This is aimed to ensure that non-settling infringers are not unduly affected by the settlement to which they were not a party.¹¹⁰¹ The remaining claim of the injured party can only be exercised against non-settling co-infringers who are not allowed to recover contribution for it from the settling co-infringer.¹¹⁰² Nevertheless, if the non-settling co-infringers cannot pay the damages corresponding to the remaining claim of the settling victim, the latter can claim it from the settling co-infringer, unless the consensual settlement expressly bars this possibility.¹¹⁰³ These rules have been adopted in order to encourage consensual settlements.¹¹⁰⁴

Damages which have been paid following consensual settlement must also be taken into account when the national courts determine the amount of contribution that a co-infringer may recover from other co-infringers on the basis of their relative responsibility for the harm caused by the infringement.¹¹⁰⁵ This provision is necessary in order to avoid that the total compensation paid by the settling co-infringers is not greater than their relative responsibility for the antitrust harm. Issues to consider in

¹⁰⁹⁹ See HÖFT, J.C., "Alternative dispute resolution in antitrust cases? On the role of mediation in US antitrust and EU and German competition law", *E.C.L.R.*, 2013, 34(8), p. 434-442, at p. 442.

¹¹⁰⁰ Article 19(1) of the Directive on Antitrust Damages Actions.

¹¹⁰¹ Recital 46 of the Directive on Antitrust Damages Actions.

¹¹⁰² This provision consolidates the situation existing today in which settling infringers try to reach that result, if possible through the terms of the settlement agreement. See WISKING, S. and DIETZEL, K., "European Commission finally publishes measures to facilitate competition law private actions in the European Union", *E.C.L.R.*, 2014, 35(4), p. 185-193, at p. 191.

¹¹⁰³ Article 19(1) of the Directive on Antitrust Damages Actions.

¹¹⁰⁴ Recital 46 of the Directive on Antitrust Damages Actions.

¹¹⁰⁵ Article 19(2) of the Directive on Antitrust Damages Actions.

determining the relative responsibility of co-infringers include their involvement in the substantive, temporal and geographical scope of the infringement, which might vary.¹¹⁰⁶

The Draft Directive stated that it aimed to make it possible for victims of antitrust violations to obtain full compensation either through damages action in court or through consensual out-of court settlements between the parties.¹¹⁰⁷ However, given the advantageous provisions for settling co-infringers (e.g. suspension of antitrust damages proceedings, reduced liability, and limited contribution obligation), there could be a risk that the Directive would in practice rather result in increasing alternative dispute resolution at the cost of damages claims. This could be problematic because injured parties generally tend to be the weaker party and there will not be equality of arms since the infringers usually have access to most of the relevant evidence needed to prove the infringement and the extent of the damage. Admittedly, the rules on disclosure of evidence reduce this information asymmetry, but only to the extent that claimants are able to comply with the rather strict condition for identifying the exact documents the disclosure of which they wish to request.

The amount of settlement is also likely to be lower than the actual harm suffered by the injured parties, precisely because the Directive only partly facilitates the bringing of damages claims, but has excluded opt-out collective actions which could make a significant difference to victims possibilities of obtaining compensation. In addition, if a risk of efficient collective actions existed, it would also make the infringers more interested in trying to satisfy the claims of the injured parties in terms corresponding more closely to the actual harm suffered, as very low settlement offers could otherwise encourage the injured parties to have recourse to court proceedings instead of ADR.

Finally, for consumers, and maybe also small-and medium-sized undertakings, ADR could however sometimes offer at least a possibility of obtaining some compensation since without effective collective redress mechanisms their current exercise of the right to compensation is limited in most Member States. This could, for instance, be the case in infringements involving a large number of consumers, if the infringers are concerned

¹¹⁰⁶ Recital 47 of the Directive on Antitrust Damages Actions.

¹¹⁰⁷ Explanatory Memorandum of the Draft Directive, at p. 19.

about their reputation and would prefer to settle the issue of compensation quietly and more quickly. Moreover, mediation would make an amicable resolution of the dispute possible.¹¹⁰⁸ But again ADR will only offer a real remedy if there are effective antitrust damages actions to fall back on should the infringers not be willing to reach a fair settlement.

4.9. The Missing Pieces

The new Directive on Antitrust Damages Actions has certain positive value. First of all, it harmonizes certain rules governing antitrust damages actions, such as establishing certain minimum obligations for disclosure of evidence and the limitation periods for bringing antitrust damages actions, which reduces the existent divergences of the national procedural and tort rules. It also codifies some of the Union *acquis* concerning antitrust damages claims in one document (e.g. the right to full compensation and the scope of damages). The measures included in the Directive should contribute to facilitating somewhat the bringing of antitrust damages actions by reducing the information asymmetry between infringers and injured parties, introducing certain rebuttable presumptions which aim to ease the burden of proof of victims, and giving claimants sufficient time to bring their damages claim.

However, the big losers are consumers, who will continue struggling with rather limited possibilities of proving the harm that they have suffered as well as high costs and risks of litigation, often in return for low compensation if the action is successful. Their limited opportunities of obtaining compensation do not fit well with the aim to ensure full compensation and to create a level-playing field for antitrust damages actions, and remove obstacles to the proper functioning of the internal market. In fact, consumers in Member States who facilitate the bringing of effective collective actions are more likely to obtain compensation and, as a consequence, undertakings established in such Member States will face a greater risk of civil liability for competition law infringements.

¹¹⁰⁸ For the possibility of using mediation in private enforcement, see HÖFT, J.C., “Alternative dispute resolution in antitrust cases? On the role of mediation in US antitrust and EU and German competition law”, *E.C.L.R.*, 2013, 34(8), p. 434-442.

This does not signify that competition law enforcement in the EU should be private-enforcement driven, but it should be a credible and useful complement to public enforcement. The manner in which the provisions of the new Directive are drafted focuses considerably more on protecting the effectiveness of public enforcement on the cost of private enforcement, instead of allowing for a more balanced approach in line with the case law of the Court of Justice.¹¹⁰⁹ Moreover, enforcement of EU law generally builds on both public and private enforcement, which was exemplified already 60 years ago by the seminal judgment in *Van Gend en Loos*.¹¹¹⁰ Private claimants therefore have an important role to play in ensuring the effectiveness of the EU competition rules.

A few more additional observations are appropriate before the main flaws with the new directive are analyzed below. Given that the legal instrument is a directive, it has to be implemented into the national legal systems before it becomes binding. The Member States will have two years from the entry into force of the Directive,¹¹¹¹ but they have certain discretion as to the form and means they choose in order to implement the provisions of the Directive. This means that some divergences between Member States will still exist even after the measures have been implemented at national level. This is especially the case with those provisions which do not contain very specific obligations, but refer, for instance, to the limits imposed by the principles of equivalence and effectiveness. The implemented measures will also not apply to antitrust damages actions which have been brought before the Directive enters into force,¹¹¹² so it will take some additional time before the provisions start to have effect in the national legal systems.

It is also important to note that the Directive does not include all the measures suggested in the Failed Draft Directive or in the White Paper and, finally, even some of the measures in the Draft Directive on Antitrust Damages Actions were amended during the

¹¹⁰⁹ See Judgment in *Pfleiderer*, EU:C:2011:389, paragraph 30 and Judgment in *Donau Chemie*, EU:C:2013:366, paragraphs 47-48.

¹¹¹⁰ Judgment in *van Gend & Loos*, EU:C:1963:1.

¹¹¹¹ Article 21 of the Directive on Antitrust Damages Actions.

¹¹¹² Article 22 of the Directive on Antitrust Damages Actions.

ordinary legislative procedure. For instance, it does not provide for collective redress or contain rules regarding the fault requirement, or costs of antitrust damages actions. The main issues arguably missing will be analyzed below, but a more detailed proposal for how the Directive should be amended in order to make antitrust damages claims a credible complement to public enforcement and to better ensure the full compensation of victims of antitrust violations.

4.9.1. The Fault Requirement

Neither the Draft Directive on Antitrust Damages Actions nor the adopted Directive contains any provision harmonizing the issue of the fault requirement, i.e. whether fault should be required or not. The Draft Directive did mention that the fault requirement had been discarded,¹¹¹³ whereas the adopted Directive does mention that any condition relating, *inter alia*, to culpability must comply with EU case law, the principles of equivalence and effectiveness and the Directive.¹¹¹⁴ The Failed Draft Directive did not establish either whether fault should be a requirement, but it reiterated that in case a Member State were to require the proof of fault, once an infringement of Article 101 or 102 TFEU had been proven, it would be presumed that the infringer had acted at fault, unless it was able to refute it.¹¹¹⁵ The infringer could refute fault if it were able to show that it could not reasonably have been aware that its conduct distorted competition.¹¹¹⁶

It is worth noting that under EU competition law, in order to demonstrate that the EU antitrust rules have been violated, it is not necessary to prove fault.¹¹¹⁷ In practice, the fault requirement would only be a potential obstacle to bringing antitrust damages actions in those Member States in which the claimant must prove this additional element either in relation to the antitrust violation or in relation to the effects of the violation, and negligence would not suffice to do so. It is therefore unlikely that the fault requirement existing in a relatively few Member States¹¹¹⁸ would be one of the

¹¹¹³ Explanatory Memorandum on the Draft Directive on Antitrust Damages Actions, at p. 12.

¹¹¹⁴ Recital 11 of the Directive on Antitrust Damages Actions.

¹¹¹⁵ Explanatory Memorandum on the Failed Draft Directive, at p. 9.

¹¹¹⁶ Article 13 of the Failed Draft Directive.

¹¹¹⁷ Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 31.

¹¹¹⁸ In the other Member States, it is presumed that fault exists if the claimant demonstrates illegality or the infringement itself is considered to constitute fault. *See* Commission Staff Working Paper, SEC

main reasons for why relatively few damages actions have been brought in the EU to date. At least as regards hard-core violations such as cartels, it could be presumed that the violation as such would be sufficient to demonstrate at least negligence (and hence fault in the Member States concerned) because the illegality of cartels is usually clear-cut. Consequently, if the infringer had participated in a cartel, it must have known that it was illegal and it would at least have behaved in a negligent manner. On the other hand, the illegality of vertical restraints might be less obvious. In these cases, the requirement of fault could even be welcome since it would serve to distinguish meritorious damages claims from the unmeritorious ones. But it would be important to ensure that the burden of proof for negligence remains reasonable so that it will not constitute another obstacle to bringing a damages claim. The measure proposed in the Failed Draft Directive could have served to address this, since it made it possible to rebut the presumption of fault if the infringer could show that it could not reasonably have been aware that its conduct distorted competition.

Apart from the fault requirement, the Directive on Antitrust Damages Actions also does not either clarify issues, which are relevant in order to assess if the standard of proof for an infringement has been met. Causation, remoteness, and foreseeability are not dealt with, but will continue to be regulated by national law, although they are subject to the limitations established by the principles of equivalence and effectiveness.¹¹¹⁹ Therefore differences in the standard of proof required for proving an antitrust violation are expected to prevail.

4.9.2. Collective Redress Mechanisms

The most noteworthy omission from the Directive on Antitrust Damages Actions is the lack of any kind of collective redress mechanism. Instead, as stated earlier, the Commission limited itself to introducing non-binding recommendations on collective redress mechanisms.¹¹²⁰

(2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 31.

¹¹¹⁹ Recital 11 of the Directive on Antitrust Damages Actions.

¹¹²⁰ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

On the contrary, the Failed Draft Directive, provided for both group actions (similar to the opt-in action suggested in the White Paper) brought by two or more victims who had suffered harm caused by the same infringement,¹¹²¹ and representative actions by qualified entities on behalf of victims who had suffered harm caused by the same infringement.¹¹²² But with respect to representative actions, the Failed Draft Directive differed from the White Paper in that it provided that qualified entities should not be required to individually identify all the victims belonging to the represented group.¹¹²³ In other words, they should be able to bring so-called opt-out collective actions. This would have improved access to justice for consumers, since their individual harm is generally too small to make the bringing of opt-in collective actions feasible as there is always a risk that too few consumers decide to opt in, which might make the group too small for the action to pay off in the first place.

The conditions for qualified entities were similar to those proposed in the White Paper but, in addition, the Failed Draft Directive prescribed that Member States were to take measures necessary to ensure effective monitoring of the qualified entities in order to ascertain that they continued to fulfill the conditions for bringing representative actions, and to lay down a procedure for withdrawal of the designation if there was evidence of abuse or the entity in question was not acting in the best interest of those it represented.¹¹²⁴

However, as stated above, collective actions were excluded from the Draft Directive on Antitrust Damages Action. Instead, the Commission opted for issuing a Recommendation on Collective Redress Mechanisms which apply not only to compensatory collective redress, but also to injunctive collective redress. Moreover, the recommendations can be used for violations of rights granted under EU law in general which cause mass harm. The recommendations on common principles aim to facilitate access to justice, put an end to illegal practices, and allow the compensation of victims of violations of rights granted by EU law in mass harm situations.¹¹²⁵ On the one hand,

¹¹²¹ Article 4 of the Failed Draft Directive.

¹¹²² Article 5 of the Failed Draft Directive.

¹¹²³ Article 5(2) and Recital 8 of the Failed Draft Directive.

¹¹²⁴ Article 6(3) and 6(4) of the Failed Directive.

¹¹²⁵ Point 1 of the Recommendation on Collective Redress Mechanisms.

representative entities and/or public authorities should be able to bring representative actions.¹¹²⁶ On the other hand, two or more natural or legal persons who have been harmed in a mass harm situation may bring a collective redress action.¹¹²⁷ These actions should, as a general rule, be based on the “opt-in” principle.¹¹²⁸

These issues and other issues covered by the recommendations, such as the criteria of admissibility, funding, representation and lawyers’ fees will be dealt in more detail in Chapter Five. At the moment, the focus of the analysis is on the fact that the Directive (or any other binding EU legislative measure) will not provide for binding collective redress mechanisms in the near/medium-term future. This is problematic since one of the main objectives of the Directive of Antitrust Damages Actions, namely to ensure “*the proper functioning of the internal market for undertakings and consumers*”,¹¹²⁹ will be difficult to achieve without the possibility of opt-out collective actions being brought on behalf of consumers in situations involving in particular numerous, but small and dispersed, individual claims.

As have been seen in Chapter Three, the existing collective actions in the Member States do not seem to work properly in order to safeguard the interests of consumers in the field of competition law. For instance, in Spain only one collective follow-on action by the consumer association Ausbanc has been brought to date, and the defendants have succeeded in suspending the proceedings several times.¹¹³⁰ In the United Kingdom and in France, the “opt-in” model resulted in turn in that neither representative action succeeded in building a group that would have represented a large part of the harmed consumers. On the contrary, merely a small fraction of the potential claimants decided to opt in.¹¹³¹

¹¹²⁶ Points 4 and 6 of the Recommendation on Collective Redress Mechanisms.

¹¹²⁷ Point 3a) of the Recommendation on Collective Redress Mechanisms.

¹¹²⁸ Point 21 of the Recommendation on Collective Redress Mechanisms.

¹¹²⁹ Recital 49 of the Directive on Antitrust Damages Actions.

¹¹³⁰ See MARCOS, F., “Competition Law Private Litigation in Spanish Courts (1999-2012)”, *G.C.L.R.*, 2013, Issue 4, p. 167-208, at p.181.

¹¹³¹ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07, HODGES, C., *The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 25, and <http://www.cartelmobile.org/>.

The costs of actions also constitute a large obstacle in particular for consumers who usually have comparatively small claims in comparison to the potential high costs. They therefore often lack sufficient incentives to bring a claim, and frequently bringing a following-on individual action is virtually impossible, while stand-alone actions are even unthinkable. But also small and medium-sized undertakings might face the same hurdles, especially if they are indirect purchasers and would be required to show the exact amount of the overcharge that has been passed on to them. For consumers and small and medium-sized businesses it would, consequently, be important to be able to bring a collective action together with other victims in order to reduce the costs and risks of the action, and to actually have an incentive to bring a claim. In addition, the possibility of derogating from the cost rules and/or encouraging contingency fees would be needed to facilitate effective collective actions.

Nevertheless, the Commission Recommendation on Collective Redress Mechanisms also includes features which would be worth exploring in order to propose a binding EU legislative measure. For instance, it has a wider scope of application as it does not only apply to antitrust violations, but to situations caused by violations of rights granted under EU law in general. This is to be welcomed as consumers often face difficulties also in bringing claims in other fields than competition law, such as general consumer claims or environmental claims. The adoption of a new legislative instrument for different types of collective damages actions and collective injunctive relief actions would be a desirable development. However, the legislative instrument chosen must be a binding instrument if it is to genuinely improve access to justice of consumers.

4.9.3. Cost of Actions

The Directive on Antitrust Damages Actions does not contain any specific provisions regarding the costs of antitrust damages actions. This issue was also not mentioned in the Failed Draft Directive. The White Paper did also not propose any legislative measures regarding cost rules, but merely encouraged the Member States to reflect on how they could adjust their cost rules and court fees to facilitate meritorious actions.¹¹³²

¹¹³² See Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, at p. 9.

However, the costs of damages actions often constitute a significant obstacle to bringing an antitrust damages claim, especially for consumers with small individual claims. In addition, the “loser pays” principle is applied in most Member States,¹¹³³ which increases the risks of bringing an antitrust damages action. The lack of opt-out collective actions in turn makes it practically impossible to bring any low-value claims. This is why some rules or, to start with, at least recommendations concerning the cost rules would be needed. Although there has been opposition to the introduction of contingency fees,¹¹³⁴ today they are allowed in some Member States, such as Spain¹¹³⁵ and Finland,¹¹³⁶ and in certain limited situations, Germany.¹¹³⁷ Similarly, a modification of the “loser pays” principle should be considered in line with Directive 2004/48/EC on the enforcement of intellectual property rights.¹¹³⁸

4.9.4. The Question of Punitive Damages

The issue of punitive damages has been addressed in the Directive on Antitrust Damages Actions by excluding this possibility. Article 2 of the Directive provides that punitive or multiple damages must not be the result of full compensation, and it prohibits over-compensation in general. Similarly, the Recommendation on Collective Redress Mechanisms states that punitive damages should be prohibited.¹¹³⁹ Punitive damages are controversial and have been opposed by a number of stakeholders.¹¹⁴⁰

¹¹³³ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, p 74.

¹¹³⁴ See Opinion of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 33.

¹¹³⁵ Judgment of the Supreme Court No 5837/2005 of November 4th, 2008.

¹¹³⁶ See VIITANEN, K., “Oikeudenkäyntikulut ja oikeuksien saatavuus”, *Defensor Legis*, 87, No 4, 2006, p. 614-632, at p. 6.

¹¹³⁷ Section 4a(1) of the Lawyers’ Remuneration Act.

¹¹³⁸ This directive allows a derogation if the “loser pays” principle does not result in a fair outcome in the case.

¹¹³⁹ Point 31 of the Recommendation on Collective Redress Mechanisms.

¹¹⁴⁰ See e.g. Opinion of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)0404, 27.1.2014, at p. 33, and Impact Assessment Report on the Directive, at p. 87.

Nevertheless, it should be recalled that the Court of Justice has not considered punitive damages to be contrary to European public order. Moreover, pursuant to the principle of equivalence, they must be available for an infringement of the EU antitrust rules if they are available for an infringement of national competition law, and are awarded in accordance with the general principles of EU law.¹¹⁴¹ The prohibition of punitive or multiple damages at Union level therefore goes against existing EU law case and should be reconsidered. Instead, its usefulness for certain types of antitrust violations, namely hard-core cartels, should be examined since it could lead higher deterrence of the most harmful competition infringements. Moreover, the introduction of e.g. double damages for hard-core cartels would make it possible to offer further advantages to immunity recipients in liberating them from paying such punitive damages.

4.9.5. Distribution of Damages

As to the distribution of damages awarded in a representative action, the new Directive only mentions the need to ensure that compensation for actual loss paid at any level in the distribution chain corresponds to the overcharge harm caused at that level. The idea is therefore to only award damages that correspond to the actual harm of each victim. This is following the principles of the Failed Draft Directive and the White Paper that damages were to be distributed, so far as possible, to the victims. However, regarding representative actions, the Failed Draft Directive would have allowed Member States to use part of the award to cover reasonable expenses incurred in bringing the representative action.¹¹⁴²

The issue of distribution of damages is important especially in cases involving claimants at different levels in the distribution chain and, in particular, in collective actions. There would therefore be a need to decide how damages which cannot be distributed among the victims should be distributed. Thus, rules concerning *cy pres* distribution should be provided. There is also a call for considering if it is in line with the common sense of justice that (due to the notable fear of over-compensation which is reflected in the new Directive) in situations where there might be some uncertainty about the exact amount of harm suffered, infringers are allowed to keep the part of the

¹¹⁴¹ See Judgment in *Manfredi*, EU:C:2006:461, paragraph 93.

¹¹⁴² Article 5(5) of the Failed Draft Directive.

damages which cannot be exactly allocated instead of using it for a purpose benefiting the society, directly or indirectly. Arguably, a fairer solution would be to punish the infringers, not the injured parties, in such cases.

4.9.6. Jurisdiction and Applicable Law

The issues concerning jurisdiction and applicable law regarding antitrust damages actions are largely regulated by the Brussels I Regulation,¹¹⁴³ which is applicable to civil and commercial matters, and the Rome II Regulation,¹¹⁴⁴ which contains rules on conflicts of laws for non-contractual obligations in civil and commercial matters. Moreover, the Rome I Regulation regulates the law applicable to contractual obligations civil and commercial matters.¹¹⁴⁵ The Directive on Antitrust Damages Actions contains very few provisions relating to these issues, and the most relevant one is that national courts should have the possibility of consolidating claims in order to avoid multiple liabilities or avoid liability. But the provisions will not affect the obligations of national courts under Brussels I or, in January 2015, Brussels I *bis*.¹¹⁴⁶ Regarding the choice of forum, it should be noted that these provisions allow, on the one hand, the parties to include a jurisdictional clause in their contract. On the other hand, it also allows post-claim consensual agreements to remove claims from the courts of the consumer's domicile, which could lead to forum-shopping.¹¹⁴⁷

An issue which might cause a problem is the so-called torpedo claims where, for instance, the infringing party initiates a defensive proceeding in an available jurisdiction, which is the most likely to decide in its favor or make the proceedings otherwise more difficult for the claimant. The *lis pendens* rules would then prevent the claimant from bringing concurrent proceedings before the courts of any Member State. Such torpedo actions are possible because there are several jurisdictions that could be

¹¹⁴³ As stated, the Brussels I Regulation (Regulation 44/2001) will be replaced by Brussels I *bis* (Regulation 1215/2012).

¹¹⁴⁴ Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31.7.2007.

¹¹⁴⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L* 177, 4.7.2008, p. 6–16.

¹¹⁴⁶ Article 15 of the Directive on Antitrust Damages Actions.

¹¹⁴⁷ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.* 2014, 35(2), p. 51-55, at p. 55.

competent to hear antitrust damages claims as Brussels I and Brussels *bis* provide for general jurisdiction¹¹⁴⁸ and special jurisdiction.¹¹⁴⁹

Also, the coordination of pending public and private enforcement actions in different Member States could be problematic following the exclusion of probative effect of decisions of a NCA or competition court when damages actions are brought in a different Member State. If the infringers and the geographical scope of the market affected by the competition infringement are the same, it would be difficult from the point of legal certainty to justify different outcomes as to the existence of an infringement.

4.10. Conclusions

The new Directive is a rather modest attempt to enhance private enforcement of the EU competition rules. Instead, it appears more concerned about preserving the role of public enforcement and only leaves a less important, subsidiary role to private enforcement. It does not in fact address the needs of arguably the largest group of victims of antitrust violations, namely final consumers. Although their individual claims might not usually be very significant, their overall losses may amount to considerable amounts, which the infringers will be able to keep, unless there is an effective redress mechanism available. It has already been demonstrated that at national level opt-in collective actions do not seem to work in cases involving consumers, as the final group of claimants tend to be too small for the collective action to pay off.¹¹⁵⁰ Therefore, larger incentives and improved financing of collective damages actions brought by consumers or on behalf of consumers would be required.

It is not suggested that private enforcement should replace public enforcement, but it should indeed play a complementary, but significant enough, role. The rules on

¹¹⁴⁸ Article 2 of Brussels I, i.e. Article 4 of Brussels *bis*, in antitrust damages actions.

¹¹⁴⁹ Article 5(3) of Brussels I, i.e. Article 7(2) of Brussels *bis*, in antitrust damages actions.

¹¹⁵⁰ E.g. a claim for damages brought by the consumers' association Which? in the United Kingdom on behalf of only approximately 130 individual consumers against JJB Sports plc., although the number of victims was estimated to be approximately 2 million. See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07 and HODGES, C., *The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 25.

disclosure of evidence in the Directive represent some improvement regarding access to evidence, which is one of the most important obstacles to bringing antitrust damages actions, but the absolute protection of leniency statements will excessively protect information needed by claimants as evidence so as to bring an antitrust damages action. Instead, a balancing test should be conducted in accordance with existing case law, which would consider the needs of both public and private enforcement. It would still be likely to protect the effectiveness of public enforcement, so the incentives for submitting leniency applications should not be considerably altered.

It should also be borne in mind that an immunity recipient already benefits from various advantages (no fines and limited civil liability). Thus, any additional benefits should not be automatically made at the cost of injured parties. Instead, other ways of awarding cooperation in the context of leniency programs should be considered: e.g. the introduction of double damages for hard-core cartels for other infringers but immunity recipients. This would allow for an increased leverage to maintain the attractiveness of leniency programs and thereby to safeguard the effectiveness of public enforcement, but at the same time allowing better to consider the interests and rights of victims of antitrust violations.

The most pressing reforms required to realistically bring about a significant change include efficient collective redress mechanisms including opt-out collective actions at least for cases involving scattered damages amongst numerous claimants (above all involving consumers), modification of the cost rules in order to make contingency fees available and/or to improve public financing and alternative funding. In addition, derogations from the “loser pays” principle should be modelled after Directive 2004/48/EC on the enforcement of intellectual property rights,¹¹⁵¹ which allows courts to derogate from the “loser pays” principle if its application does not lead to a fair result in the case at issue.¹¹⁵²

¹¹⁵¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p.

¹¹⁵² See LESKINEN, “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, 87-121, at p. 199.

Although the Directive has some merit in that it harmonizes some issues that in the past have created obstacles for private enforcement, and codifies some principles of EU law which governed damages actions, many of the measures to be introduced merely constitute minimum harmonization, and some of them have been even further watered down in the legislative procedure. This will result in national divergences being maintained in a number of areas, such the quantification of damages, collective redress and the costs of bringing antitrust damages actions. Therefore, the Directive is a missed opportunity to improve access to justice in cases involving infringements of the EU competition rules, and the common rules proposed will not be sufficient to ensure the effective and uniform enforcement of the Union right to compensation for infringements of Article 101 and 102 TFEU. It will also not significantly improve access to justice for consumers.

These issues should be examined and remedied when the Directive is reviewed four years after it has been implemented, i.e. most probably in year 2020.

5. THE COMMISSION RECOMMENDATION ON COLLECTIVE REDRESS MECHANISMS

5.1. Background and General Overview

Collective actions generally enhance victims' access to justice since they can take advantages of economies of scale and bundle their resources which, in turn, reduces the costs of the action. As concluded in the previous chapter, they could therefore serve to improve especially the redress of consumers who have suffered harm from antitrust violations. As demonstrated above, today consumers seldom bring damages actions, and the few that have been brought, have not been very successful.¹¹⁵³ In light of the limited case law of collective actions brought for antitrust damages, the existing collective redress mechanisms in the Member States clearly suffer from a number of flaws, which make it both burdensome and expensive to bring collective claims. However, whether the introduction of new collective action mechanisms would increase the effectiveness of antitrust damages actions would depend on the type of collective actions introduced. In addition, there must be sufficient funding as well as incentives for collective actions to be brought.¹¹⁵⁴

Nevertheless, as stated in the Chapter Four, the Directive on Antitrust Damages Actions does not provide for any kind of collective actions, but instead the Commission has introduced non-binding recommendations on collective redress mechanisms.¹¹⁵⁵ This represents a significant change from the Commission's initial plans regarding collective redress. Originally, the Commission envisaged specific collective antitrust damages actions. Victims of antitrust violations were to be entitled to bring an opt-in collective action for damages, or be represented in a representative action for damages by qualified entities. The qualified entities were to be designated in advance by the Member States according to national procedures, representing legitimate and defined

¹¹⁵³ See e.g. Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07 and <http://www.cartelmobile.org/>.

¹¹⁵⁴ See LESKINEN, C., "Collective Actions: Rethinking Funding and Cost Rules", *Comp. L.Rev.* Volume 8(1), 2011, p. 87-121, at p. 88, and LESKINEN, C., "Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model", Working Paper IE Law School, WPLS10-03, 26.4.2010, at p. 29, available at <http://ssrn.com/abstract=1612731>.

¹¹⁵⁵ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

interests. Alternatively, other existing entities could be certified in order to bring a representative action in relation to a particular infringement on an *ad hoc* basis. But the second option were to be limited to entities whose primary task is to protect the defined interests of their members, such as trade associations defending the interests of their members, active in a given industry. Qualified entities having standing in one Member State were also automatically to be granted standing in all other Member States. These collective redress mechanisms were to ensure a minimum level of protection, but Member States could decide to go beyond these types of actions conforming to their legal traditions.¹¹⁵⁶

The Failed Draft Directive also provided both for group actions brought by two or more victims similar to the opt-in action suggested in the White Paper,¹¹⁵⁷ and representative actions by qualified entities, but the representative body would not have been required to individually identify all the victims belonging to the represented group.¹¹⁵⁸ It also provided for additional safeguards by prescribing that Member States were to take measures necessary to ensure effective monitoring of the qualified entities in order to ascertain that they continued to fulfill the conditions for bringing representative actions, and to lay down a procedure for withdrawal of the designation if there was evidence of abuse, or the entity in question was not acting in the best interest of those it represented.¹¹⁵⁹

During the legislative procedure of the Directive on Antitrust Damages Actions, the European Parliament and other bodies consulted were in general in favor of introducing collective actions, but stated that the admissibility of the action should be assessed by an appropriate national authorizing body,¹¹⁶⁰ and settlement through alternative dispute

¹¹⁵⁶ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-20.

¹¹⁵⁷ Article 4 of the Failed Draft Directive.

¹¹⁵⁸ Article 5(2) and Recital 8 of the Failed Draft Directive.

¹¹⁵⁹ Article 6(3) and 6(4) of the Failed Draft Directive.

¹¹⁶⁰ See e.g. Opinion of the Committee on the Internal Market and Consumer Protection on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at § 6 and Opinion of the Committee on Legal Affairs on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 22.1.2009, at § 4.

resolution should be encouraged.¹¹⁶¹ The Committee on Legal Affairs found that any proposal in this area should be based on a model that could also be applied to other kinds of disputes in order to provide judicial protection for consumers in similar cases.¹¹⁶² The European Parliament, in turn, highlighted that measures at Union level were not to lead to arbitrary or unnecessary fragmentation of national procedural laws.¹¹⁶³

The first indication of a changed stance of the Commission was the launch of a public consultation concerning collective redress in the EU¹¹⁶⁴ in which the Commission suggested the adoption of a horizontal approach regarding collective redress. In other words, the under-lying idea was to adopt a common framework that would be applicable to different types of actions, such as competition law damages actions and consumer and environmental claims, because victims of antitrust violations, environmental damages or breaches of consumer rights often face problems that are common to them when they seek to enforce their rights. Moreover, collective redress mechanisms were considered necessary since otherwise it is very difficult and/or unattractive for consumers and SMEs in practice to bring a claim for damages.¹¹⁶⁵ The identification of common legal principles on collective redress was intended to serve as guidance for an EU-wide legislative initiative called “An EU framework for collective redress”, foreseen in the Commission Work Programme 2012¹¹⁶⁶ and called for by the European Parliament.¹¹⁶⁷

¹¹⁶¹ See e.g. Opinion of the Committee on the Internal Market and Consumer Protection on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at § 9.

¹¹⁶² See Opinion of the Committee on Legal Affairs on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 22.1.2009, at § 2c). See also Opinion of the European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules COM(2008) 165 final, *OJ C* 228, 25.3.2009, p. 40-46 at p. 44.

¹¹⁶³ See European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)), at § 5.

¹¹⁶⁴ See Commission Staff Working Document, Public consultation: Towards a coherent European Approach to Collective Redress, SEC(2001)172 final, 4.2.2011.

¹¹⁶⁵ See ALMUNIA, J., “Common standards for group claims across the EU”, speech delivered at EU University of Valladolid, School of Law, Valladolid, on October 15th, 2010.

¹¹⁶⁶ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2012, COM(2011) 777 final, 15.11.2011, at p. 20.

¹¹⁶⁷ See European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)), 2.12.2012.

The feed-back regarding the public consultation showed that, in general, consumers were in favor of the introduction of collective redress mechanisms, whereas businesses were against. Moreover, such mechanisms find support amongst academics. More lawyers were either skeptical about or opposed to collective actions, although there were different opinions. Similarly, Member States were divided. Denmark, the Netherlands, Sweden, and Latvia were in favor of introducing binding EU rules with regard to specific policy fields or issues, while others were strongly opposed to the introduction of collective actions. But overall, a majority of the stakeholders supported establishing common principles for collective redress at EU level, although on the condition that they should fit into the EU legal system and the legal orders of the Member States. In addition, the practical experience of existing national collective redress systems should be considered.¹¹⁶⁸

The feed-back obtained during the legislative procedure, especially by the European Parliament, as well as the public consultation regarding collective redress results explain why the Commission decided to extend the scope for collective redress mechanisms to other situations than antitrust violations which have caused mass harm,¹¹⁶⁹ and not only suggested collective actions for damages claims, but also for injunctive relief. This extended scope is welcome because injunctive relief is also important for the victims of antitrust violations (and other mass harm situations). Similarly, it is justified to extend the redress mechanisms to other situations in which consumers have suffered mass harm due to violations of rights granted under EU law. However, it is unsatisfactory that the Commission has opted for merely issuing recommendations on collective redress mechanisms instead of providing for binding collective actions.

¹¹⁶⁸ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 6.

¹¹⁶⁹ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65, at Recital 5. Hereinafter, this document will be referred to as “The Recommendation on Collective Redress Mechanisms” or “Recommendation”.

The following sections will analyze these recommendations in order to determine their main flaws, and the issues that should be modified in order to contribute to enhanced private enforcement.

5.2. Purpose and Scope of the Recommendation

The common principles laid down in the recommendations aim to facilitate access to justice, put an end to illegal practices, and allow the compensation of victims of violations of rights granted under EU law in mass harm situations. At the same time, their objective is to ensure appropriate safeguards to avoid abuse.¹¹⁷⁰ The Commission recommends that all Member States should provide for collective redress mechanisms for both injunctive and compensatory relief. These national mechanisms should respect the same common principles established in the Recommendation and different legal traditions, and these common principles should apply in all cases of collective redress,¹¹⁷¹ with the exception of existing sectorial mechanisms of injunctive relief provided for by EU law.¹¹⁷² The approach chosen is therefore horizontal, i.e. they should apply in all fields covered by the Recommendation. The procedures should be fair, equitable, timely, and not excessively expensive.¹¹⁷³

The Recommendation establishes, on the one hand, principles common to injunctive and compensatory collective redress and, on the other hand, specific principles which relate to each of these forms of collective redress. Moreover, they contain some suggestions concerning the registry of collective redress actions, as well as recommendations on the supervision and reporting of the implementation of the principles laid down in the Recommendations.

The Commission itself considers the horizontal Recommendation and the sector-specific Directive on Antitrust Damages Actions as a "package" that reflects a balanced

¹¹⁷⁰ *Ibid.*, at point 1.

¹¹⁷¹ Points 2 and 3(e) of the Recommendation on Collective Redress Mechanisms.

¹¹⁷² Recital 14 of the Recommendation on Collective Redress Mechanisms.

¹¹⁷³ Point 2 of the Recommendation on Collective Redress Mechanisms.

approach, which it has deliberately chosen.¹¹⁷⁴ It has also expressly stated that the Directive on Antitrust Damages Actions leaves it to Member States to decide whether or not to introduce collective redress actions for antitrust damages.¹¹⁷⁵

This approach is regrettable, as the existing collective actions the Member States are not effective in order to safeguard the interests of consumers in the field of competition law. For instance, in Spain only one collective follow-on action by the consumer association Ausbanc has been brought to date,¹¹⁷⁶ and in Sweden¹¹⁷⁷ and Finland¹¹⁷⁸ there have been no antitrust collective actions at all. In the United Kingdom and in France, due to the “opt-in” model, merely a small fraction of the potential claimants joined the representative action in question.¹¹⁷⁹ In Germany and in Ireland, collective actions are not even available for claiming damages for antitrust violations.¹¹⁸⁰ At the other end of the spectrum, Denmark¹¹⁸¹ and Portugal¹¹⁸² allow for opt-out collective actions in certain situations, and the future UK collective action promises to ease mass consumers claims resulting from antitrust violations, as well as opens the door for collective actions by businesses.¹¹⁸³ There are thus significant differences between the availability of and forms of collective actions in the different Member States, although it seems that

¹¹⁷⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 4, Note 10.

¹¹⁷⁵ *Ibid.*, at p. 4.

¹¹⁷⁶ See MARCOS, F., “Competition Law Private Litigation in Spanish Courts (1999-2012)”, *G.C.L.R.*, Issue 4, 2013, p. 167-208, at p. 181.

¹¹⁷⁷ See HENRIKSSON, L., AHRC Project, “*Private Enforcement and Consumer Redress in Sweden 1999-2012*”, at p. 7.

¹¹⁷⁸ See AINE, A., AHRC Project, “*FINLAND, National Report*”, at p. 12.

¹¹⁷⁹ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07, HODGES, C., *The Reform of the Class and Representative Actions in European Legal Systems. A New Framework for Collective Redress in Europe*, Hart Publishing, Oxford and Portland, Oregon, 2008, and <http://www.cartelmobile.org/>.

¹¹⁸⁰ Section 33(2) of the German Act Against Restraints of Competition only provides for injunctive collective actions.

¹¹⁸¹ In case the individual claims of the group members do not exceed 2,000 DKK, public authorities can bring an opt-out collective action in Denmark. See GAUDET, R., “Turning a blind eye: the Commission’s rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience” *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 114.

¹¹⁸² Chapter 3, Section 14 of Participation and Popular Action Law 83/95 of August 31st, 1995.

¹¹⁸³ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 32.

none of the opt-in collective actions are particularly efficient in compensating consumers.

Also, comparing compensatory collective action to injunctive relief, it should be mentioned that there has been some harmonization regarding injunctive relief, i.e. Directive 2009/22/EC on injunctions for the protection of consumer interests,¹¹⁸⁴ which is applicable to infringements of the EU directives listed in the Annex I of the directive the effect of which is to harm collective interests of consumers.¹¹⁸⁵ But the directive does not create a right to claim compensation.

On the other hand, the Recommendation on Collective Redress Mechanisms intends to establish some common principles not only for injunctive collective redress, but also for compensatory redress, concerning standing to bring a representative action, admissibility of such actions, information about such actions, reimbursement of legal costs of the winning party, funding, and cross-border cases.¹¹⁸⁶ Regarding specifically compensatory collective redress, the Commission has issued recommendations relating to the construction of the group based on the “opt-in” principle, collective ADR and settlements, legal representation and lawyers’ fees, punitive damages, funding, and collective follow-on actions.¹¹⁸⁷ These are all important issues to consider in designing an optimal compensatory collective action but, arguably, the legal instrument chosen will fail to bring about a significant improvement of compensatory collective relief in a medium-term future. Instead, a directive would be a more efficient legal instrument since it imposes binding obligations on the Member States, while it still allows respecting different legal traditions, and leaves Member States some choice as to the form of the measures to be implemented.

However, the Commission is right in believing that other areas where Union rights have been violated than the field of competition law should also be enforced uniformly throughout the EU. The horizontal approach to collective redress is therefore

¹¹⁸⁴ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests, *OJ L 110*, 1.5.2009, p. 30–36.

¹¹⁸⁵ Article 1 of Directive 2009/22/EC.

¹¹⁸⁶ Part III of the Recommendation on Collective Redress Mechanisms.

¹¹⁸⁷ Part V of the Recommendation on Collective Redress Mechanisms.

acknowledged to be correct. Given that injunctive relief for infringements of EU rights in the consumer field has already been provided for cross-border situations, arguably collective compensatory (and injunctive) relief in order ensure access to justice and stop infringements in mass harm situations would also require binding measures at EU level. In particular in cases where, for instance, an antitrust violation causes harm in another Member States, EU-wide collective actions would be needed in order to ensure the uniform and effective enforcement of the Union right to damages. As will be demonstrated in Chapter 7, there would also be a legal basis for adopting a Union legislative measure in this field.

5.3. Standing to Bring Collective Actions

The Commissions recommends the Member States to provide both for representative actions brought by representative entities and collective redress actions brought by two or more natural or legal persons who have been harmed in a mass harm situation to claim compensation (or an injunction).¹¹⁸⁸ It is welcome that not only representative actions should be provided for, but collective actions could also be brought by individuals. One of the main reasons is that, to date, even if representative actions are widely available in the Member States, they have not been brought extensively.¹¹⁸⁹ Arguably, this shows that the existing forms of representative actions need improvements in order to make them work in practice. This inactivity of consumer associations in bringing representative actions is mainly due to the lack of sufficient financial means to fund the actions, or unwillingness to accept the risks of the costs of losing.¹¹⁹⁰ Because of the limited financial resources available to consumer associations and other representative bodies, they are forced to prioritize their action.¹¹⁹¹

Moreover, the incentives to bring representative actions are also smaller than for collective actions initiated by individuals or lawyers, since the financial gains will usually go to the victims (or sometimes to a fund established for the benefit of the group

¹¹⁸⁸ Point 3a) of the Recommendation on Collective Redress Mechanisms.

¹¹⁸⁹ See HODGES, C., “Europeanization of civil justice: trends and issues”, *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 115.

¹¹⁹⁰ *Ibid.*, at p. 115.

¹¹⁹¹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

or to finance future actions), and the representative entity will only obtain compensation for its legal costs if the action is successful. Similarly, the financial risks involved in bringing an action are likely to encourage the representative bodies to only bring actions that they would be certain of winning, while they would avoid bringing complex cases.¹¹⁹² Because of all these reasons, the option for individuals or legal persons to bring themselves a collective action increases their access to justice, provided that they have access to funding, and the costs and other risks of the action can be kept in check.

As to representative actions, criteria should be established in order to determine the eligibility of representative entities. This is particularly important because only the representative entity, not the group, is party to the representative action, so the representative entity must genuinely act in the best interest of the group.¹¹⁹³ The minimum criteria should include the entity having a non-profit character; that there is a direct relationship between its main objectives and the Union rights that have allegedly been violated in respect of which the action is brought; and sufficient capacity of the entity as regards financial and human resources, and legal expertise to represent multiple claimants acting in their best interest.¹¹⁹⁴ The representative entity should be required to prove that it meets these criteria.¹¹⁹⁵ Furthermore, the representative entities must at all times meet at least all these requirements.¹¹⁹⁶ In addition to representative entities which have been officially designated in advance in accordance to the minimum criteria, the national authorities or courts of the Member States should also be able to certify entities on an *ad hoc* basis for a particular representative action.¹¹⁹⁷

¹¹⁹² See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Recommendations from the Office of Fair Trading, OFT916resp, November 2007, at p. 23.

¹¹⁹³ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 10.

¹¹⁹⁴ Point 4 of the Recommendation on Collective Redress Mechanisms.

¹¹⁹⁵ Recital 18 of the Recommendation on Collective Redress Mechanisms.

¹¹⁹⁶ Point 5 of the Recommendation on Collective Redress Mechanisms.

¹¹⁹⁷ Point 6 of the Recommendation on Collective Redress Mechanisms.

These two different ways of designating/certifying representative entities were also suggested in the White Paper on Antitrust Damages Actions¹¹⁹⁸ and the Failed Draft Directive.¹¹⁹⁹ It is crucial that it would be possible to certify an entity to bring a representative action on an *ad hoc* basis because entities designated in advance might not necessarily always be apt to act in the best interest of the claimants, be it because of the influence of political interests, or the lack of financial resources. Otherwise claimants might also be barred from seeking compensation in meritorious cases.¹²⁰⁰ In this respect, the Recommendation will enhance the redress possibilities in some Member States where representative entities currently have to satisfy the conditions defined by law in order to be able to bring representative actions. But an issue to determine will still be the extent of discretion left to the court to certify a representative action on an *ad hoc* basis.

Additionally, or alternatively, the Commission recommends that public authorities should be empowered to bring representative actions.¹²⁰¹ This possibility also exists already in some Member States (e.g. Denmark and Sweden) so it is important to maintain this option in order to take into account the legal systems and legal traditions of the Member States in designing EU-wide collective redress actions.

As to the definition of the group represented in a compensatory representative action, the group is composed by individuals or legal persons who have been harmed by the same alleged infringement of a right conferred by Union law in a mass harm situation.¹²⁰² Collective actions brought by two or more individuals (or legal persons) will as a general rule, be based on the “opt-in” principle, thus requiring the express consent of any natural or legal person wishing to join the action. Exceptions to this principle are possible either by law or by court order, but in those cases they must be

¹¹⁹⁸ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-20.

¹¹⁹⁹ Article 4 of the Failed Draft Directive.

¹²⁰⁰ See LESKINEN, C., “*Collective Antitrust Damages Actions in the EU: The Opt-In v. the Opt-Out Model*”, Working Paper IE Law School, WPLS10-03, 26.4.2010, at p. 25, available at <http://ssrn.com/abstract=161273>.

¹²⁰¹ Point 7 of the Recommendation on Collective Redress Mechanisms.

¹²⁰² Point 3(d) of the Recommendation on Collective Redress Mechanisms.

duly justified “*by reasons of sound administration of justice*”.¹²⁰³ A member of the group should be free to opt out from the action at any time before the final decision by the court, or before it is otherwise validly settled. The conditions for opting out from the action should be the same as those which apply to withdrawal in individual actions. Therefore, members of the group should have the choice of pursuing their claims in another form, provided that it does not undermine the sound administration of justice.¹²⁰⁴ Thus, the judgment will only be binding on those who have opted to join the collective redress action.¹²⁰⁵

It should also be possible for potential claimants to opt in the collective action at any time before the judgment is given, or it is otherwise validly settled, again as long as this does not undermine the sound administration of justice.¹²⁰⁶ This opportunity is crucial in order to ensure that the group of claimants will be sufficiently large in order to merit the bringing of the collective redress action.

The defendant should also be informed about the composition of the group of claimants and any changes in the group.¹²⁰⁷ This requirement is necessary in order to respect the defendant’s right to a fair trial, and to comply with Article 6(1) of the European Human Rights Convention¹²⁰⁸ and Article 47(2) of the Charter of Fundamental Rights of the European Union.¹²⁰⁹

Arguments often made in order to support the “opt-in” model include that it is less prone to abuse than “opt-out” collective actions, since the parties are free to choose whether to participate in the action. Another benefit mentioned is that it facilitates the determination of the value of the collective action, simply consisting of the sum of all individual claims, which makes it easier for the court to assess the merits of the case,

¹²⁰³ Point 21 of the Recommendation on Collective Redress Mechanisms.

¹²⁰⁴ Point 22 of the Recommendation on Collective Redress Mechanisms.

¹²⁰⁵ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 11.

¹²⁰⁶ Point 23 of the Recommendation on Collective Redress Mechanisms.

¹²⁰⁷ Point 24 of the Recommendation on Collective Redress Mechanisms.

¹²⁰⁸ Available at www.echr.coe.int/ECHR.

¹²⁰⁹ Charter of Fundamental Rights of the European Union, *OJ C* 326, 26.10.2012, p. 391–407.

and the admissibility of the collective action.¹²¹⁰ It is also considered compatible with Member States legal traditions because group members cannot be bound by a judgment resulting from the collective action against their will.¹²¹¹

On the other hand, “opt-out” collective actions are precisely accused of being unconstitutional or incompatible with national legal traditions, since a party does not necessarily preserve the autonomy to choose whether to join the collective action.¹²¹² Nevertheless, it must be borne in mind that members should be provided with a possibility of opting out from the action. This problem would therefore only apply in those cases where all group members cannot be defined and reached in time in order to genuinely allow them to opt out.

Some opposition to the “opt-out” model also exists because it is considered not to achieve the aim of collective redress, i.e. to obtain compensation for harm suffered, since the damages will not be distributed to the injured parties as they are not identified.¹²¹³ However, arguably, it would at least partly depend on how the opt-out collective action is designed, since in the U.S. class action,¹²¹⁴ if not all, at least a number of the class members will be identified, regardless of it being built on the “opt-out” principle.

But as has been demonstrated in Chapter Three, one of the fundamental problems with the “opt-in” model is that it often fails to ensure effective access to justice. Since claimants must take an active step to join the action, the number of claimants willing to do so could be too low. In fact, in the past, the participation rate of consumers in opt-in collective actions in general in the EU has been less than 1%, whereas the participation

¹²¹⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 11-12.

¹²¹¹ See e.g. THE SWEDISH JUSTICE DEPARTMENT, “*Assessment Report on the Group Proceeding*”, Ds 2008:74, October 28th, 2008, at p. 70.

¹²¹² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 11-12.

¹²¹³ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 12.

¹²¹⁴ See Chapter Six for more details on the U.S. class action.

rate in opt-out collective actions has been significant.¹²¹⁵ The participation rate in opt-in collective antitrust damages actions has also tended to be merely a fraction of the potential group members.¹²¹⁶ Arguably, the “opt-in” model would not be possible for multiple, small, individual damages claims since the risk of losing, associated with the obligation to pay the other party’s costs of litigation, discourage claimants from opting in.¹²¹⁷ The “opt-in” model also has the disadvantage for the defendant that it will not know how many individual actions it might face later, since it will not know the total number of possible claimants. Similarly, courts risk having to deal with numerous individual claims being brought later, which will make the process burdensome.¹²¹⁸

Instead, in cases involving numerous damages actions of low-value, the injured parties’ constitutional right of access to justice would be better guaranteed in the “opt-out” model.¹²¹⁹ In the worst-case scenario, the claimant would not receive any compensation, which would also have been the case if the action had not been brought on its behalf, because its individual claim would have been too small to be enforced individually, whereas, in the best-case scenario, it would receive at least some compensation for the loss that it has suffered. Moreover, thanks to technological progress, the increased possibilities of reaching potential claimants would often guarantee in these cases that the claimants would also have a possibility to opt out,¹²²⁰ if they preferred not to pursue their claim, or to pursue their claim separately.

¹²¹⁵ For example, the participation rate has been 97% in the Netherlands and almost 100% in Portugal. See BEUC, The European Consumers’ Association “European Group Action. Ten Golden Rules”, available at: http://www.euractiv.com/ndbtext/European_Group_Action_10_Golden_Rules.pdf and MULHERON, R. “Reform of collective redress in England and Wales: a perspective of need”, Civil Justice Council of England and Wales, 2008, at p. 153, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf.

¹²¹⁶ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07 and <http://www.cartelmobile.org/>.

¹²¹⁷ See MICKLITZ, H.-W., and STADLER, A., “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, *EBLR*, Vol. 17, Issue 5, 2006, p. 1473-1503, at p. 1499.

¹²¹⁸ See MULHERON, R., “Some difficulties with Group Litigation Orders – and why a class action is superior”, *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 54.

¹²¹⁹ For a more extensive analysis of the claimed advantages of the “opt-in” model over the “opt-out” model with regard to access to justice, see CIVIL JUSTICE COUNCIL, “Improving Access to Justice through Collective Actions”, Developing a More Efficient and Effective Procedure for Collective Actions, A Series of Recommendations to the Lord Chancellor, July 2008, at p. 133-134.

¹²²⁰ See LESKINEN, C., “Recent Developments on Collective Antitrust Damages Actions in the EU”, *G.C.L.R.*, Volume 2, No 4, 2011, p. 79-88, at p. 87.

It is submitted that the decision of whether a collective redress action should be brought based on the “opt-in” or “opt-out” model, taking into account the interests of all the parties (claimant(s) and defendant(s)) and the effective management of the action, should therefore be left for the courts to decide, at least in cases involving numerous damages actions of low-value. This seems as the only effective way of ensuring an “effective remedy” under Article 47(1) of the Charter of Fundamental Rights of the European Union for consumers. When the Court of Justice and the national courts implement EU law, they have to ensure that effective remedies under Article 47 are available. This obligation therefore also applies when national court rule on antitrust damages actions.

Regardless of the form of collective redress, effective dissemination of information about the action is vital in order to ensure that other victims of the same or similar alleged infringement learn of the action so that they can join and obtain easier access to justice.¹²²¹ According to the Recommendation, both the representative entity (including *ad hoc* certified bodies or public authorities) and the group of claimants should be able to disseminate information about the alleged violation of Union rights, the mass harm situation, and their intention to bring a compensatory collective action.¹²²² Apart from the representative entity and group of claimants, the court should also be involved in ensuring that potential group members learn about the collective redress action. The Union instrument should therefore include some provisions about the court’s role in this matter.

But the Recommendation also sets certain limitations on the dissemination methods that should be used. Consequently, they should take into account the particular circumstances of the mass harm situation at issue, the freedom of expression, and the right to information. Also, the right to protection of the reputation or the company value of the defendant should be considered before its responsibility is definitely decided,¹²²³ since advertising and other means of trying to inform potential group members about

¹²²¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 12.

¹²²² Point 10 of the Recommendation on Collective Redress Mechanisms.

¹²²³ Point 11 of the Recommendation on Collective Redress Mechanisms.

the collective redress action could have negative effect on the defendant's reputation and economic standing. A balance should therefore be found between freedom of expression and the right to access information, on one hand, and the protection of the defendant's reputation, on the other hand. This is why the timing and the conditions for the dissemination of the information would need to be determined by the court.¹²²⁴

The Recommendation proposes the establishment of national registries of collective redress actions, which should be available free of charge to any interested person. Comprehensive and objective information on the available methods for obtaining compensation should be provided on websites publishing these registries.¹²²⁵ It is suggested that these registries could also serve to notify potential members of the affected group about a collective action or representative action being brought and, depending on the type of action available, the conditions for joining the action, or the need to opt out in order not to be bound by the resulting judgment or settlement.

The Recommendation also intends to establish common principles for collective follow-on actions. In those areas of law in which a public authority can adopt a decision finding that there has been a violation of EU law (e.g. competition, environment, data protection or financial services), private collective actions should, in general, be brought only once the public action has been concluded definitively if the public action has started before the compensatory action.¹²²⁶ The idea behind this recommendation is to protect the effectiveness of public enforcement. The problem with this approach, if applicable to antitrust damages actions, is that proceedings would automatically be prolonged, and stand-alone actions would be prohibited in cases involving public enforcement action. This would naturally not be a problem with regard to cartels, since it would be virtually impossible for injured parties to even bring a collective antitrust damages action without an infringement decision establishing the antitrust violation. But for other types of antitrust violations, obliging injured parties to wait for the public enforcement action to come to an end, and for the judgment to become final, would sometimes have the

¹²²⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 12.

¹²²⁵ Points 35-36 of the Recommendation on Collective Redress Mechanisms.

¹²²⁶ Point 33 of the Recommendation on Collective Redress Mechanisms.

opposite effect than enhancing redress and access to justice. Instead, the possibility of public authorities participating as *amicus curiae* in the collective redress action should be considered. This possibility is already provided for in the field of antitrust damages actions.¹²²⁷ In addition, national courts would always have the possibility of requesting a preliminary ruling under Article 267 TFEU from the Court of Justice if they have doubts about the interpretation of EU law.¹²²⁸

Nevertheless, in cases in which the collective action has been initiated before the public enforcement action, the Recommendations merely suggest that the court dealing with the collective action should avoid giving a decision conflicting with a decision contemplated by the public authority.¹²²⁹ This would therefore be in line with Regulation 1/2003¹²³⁰ and the *Delimitis* and *Masterfoods* rulings with regard to decisions on infringements of the EU antitrust rules.¹²³¹ In order to avoid taking conflicting decisions, the court could stay the proceedings until the public enforcement action has been concluded.¹²³² But since this would potentially result in a significant delay in deciding the antitrust damages action, it is submitted that the national authority should be able to act as an *amicus curiae* instead in line with what is foreseen with regard to the coordination of private and public enforcement actions within the same Member State.¹²³³ However, this would require the national courts to approve the intervention of the foreign NCA in the damages proceedings.

In cases involving follow-on actions, the Recommendations also propose measures to ensure that limitation periods should not prevent claimants from seeking compensation before the conclusion of the proceedings of the public authority.¹²³⁴ Again, this

¹²²⁷ Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L* 1, 4.1.2003, p. 1-25.

¹²²⁸ Admittedly, the preliminary ruling procedure can take fairly long, but if a decision by a NCA is appealed to all instances, the public enforcement action would take much longer, *see e.g. the Antena 3 Case* in Spain which lasted over 15 years, commented on in Section 3.5.1.

¹²²⁹ Point 33 of the Recommendations on Collective Redress Mechanisms.

¹²³⁰ Article 16(1) of Regulation 1/2003.

¹²³¹ *See* Judgment in *Delimitis*, C-234/89, EU:C:1991:91, paragraph 47, and Judgment in *Masterfoods*, EU:C:2000:689, paragraph 52.

¹²³² Point 33 of the Recommendation on Collective Redress Mechanisms.

¹²³³ *See* Article 15(3) of Regulation 1/2003.

¹²³⁴ Point 34 of the Recommendation on Collective Redress Mechanisms.

recommendation seems to be modeled after competition law, since the Directive on Antitrust Damages Actions provides that the limitation period for follow-on damages actions must be suspended until at least one year after the decision by the competition authority in question is final, or the proceedings are otherwise terminated.¹²³⁵ In this manner, the claimant can take advantage of the public decision establishing the existence of the infringement, and can focus on proving the causal relationship and the amount of the harm which it has suffered.

However, one problem with follow-on actions for antitrust damages is that the decision by the Commission or a national competition authority establishing an infringement does not necessarily demonstrate that the infringement has actually caused harm. The file of the competition authority might therefore be of limited value for proving the damage, since it has not been compiled for that purpose. This thus explains why consumers are currently not bringing cross-border cases. Moreover, it would be necessary to ensure the coherent and uniform application of the EU antitrust rules when proceedings are brought before an NCA of one Member State and, simultaneously, an antitrust damages action is brought before a court of another Member State.¹²³⁶ It is suggested that the national registries proposed by the Commission in its Recommendation could serve for this purpose by containing information about envisaged and pending collective actions. The NCAs could then act as *amicus curiae* if their participation is required in order to ensure the coherent and uniform application of Articles 101 and 102 TFEU.

5.4. Cross-border Collective Actions

The Recommendation also lays down principles concerning cross-border collective actions. In situations involving cross-border harm, national rules on admissibility, standing of groups of claimants or representative entities should not prevent a single collective action before a single forum. In other words, Member States should not require the representative entities to originate from their own national legal system, but they should allow any representative entity which has been officially designated in

¹²³⁵ Article 10(4) of the Directive on Antitrust Damages Actions.

¹²³⁶ See DANOV, M. and BECKER, F., “*The Way Forward: A Strong Case for Reform at EU Level*” in DANOV, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 407-420, at p. 416-417.

advance by a Member State to bring collective actions concerning a mass harm situation. Similarly, Member States should also not prevent foreign groups of claimants from bringing a collective action.¹²³⁷ These recommendations are necessary in order to make cross-border actions feasible as precisely they involve foreign claimants, and may require a foreign representative entity to bring the claim if the national ones cannot, or will not, bring the claim.

As to the rules of jurisdiction, the Brussels I Regulation (Regulation 44/2001) provides for different grounds of jurisdiction.¹²³⁸ Collective claims by consumers can be brought before the court where the consumers are domiciled. It is also possible to bring such claims before the court where the defendant is domiciled.¹²³⁹ There might therefore be some uncertainty about which jurisdiction would be appropriate in order to ensure the optimal way of dealing with the case. The Commission proposes that the report on the application of the Brussels I Regulation should also analyze the effective enforcement in cross-border collective actions, but does not recommend any specific jurisdictional rules for the time-being. Some stakeholders had suggested that the competent court should be the one in the jurisdiction of which most of the injured parties are domiciled, and/or the jurisdiction for consumer contracts should be extended to representative entities bringing a collective claim on their behalf. Other stakeholders preferred the court of the place where the defendant is domiciled in order to facilitate the identification of the competent jurisdiction and to ensure legal certainty.¹²⁴⁰ But if this were the only available jurisdiction, it could lead to bias in favor of the defendant being tried before its “home” court. Moreover, it would limit cross-border collective actions, and it would also not be possible to sue several defendants before the same court under Article 6(1) of Brussels I.¹²⁴¹ Some stakeholders also suggested that a special judicial panel for cross-border collective actions should be created with the Court of Justice.¹²⁴²

¹²³⁷ Points 17-18 of the Recommendation on Collective Redress Mechanisms.

¹²³⁸ Also the Brussels I *bis* Regulation (Regulation 1215/2012) which will replace the Brussels I Regulation provides for different grounds of jurisdiction.

¹²³⁹ Article 16 of the Brussels I Regulation and 18 of the Brussels I *bis* Regulation.

¹²⁴⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 13-14.

¹²⁴¹ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M.,

In addition, regarding antitrust damage cases, it has been suggested that claimants should be allowed to centralize litigation against a group of the same companies (which form a single infringing undertaking) before the courts of their jurisdiction of choice. In other words, the claimant could establish jurisdiction against one of the subsidiaries, and then centralize litigation against the whole group of companies and other infringers of the EU antitrust rules before that jurisdiction. In this manner, consumer associations or direct purchasers could bring collective actions against undertakings in their preferred jurisdiction, which could increase the existing low mobility of individual consumers in the EU, which is due to the high costs of cross-border litigation.¹²⁴³

Since the Brussels I and Brussels I *bis* Regulations provide for different grounds of jurisdiction, the possibility of forum shopping causes uncertainty for the defendants, whereas the possibility of torpedo actions can undermine effective access to justice for claimants, especially if a defendant decides to bring an action for declaratory judgment before a jurisdiction where the existing procedural and tort rules make it challenging to obtain damages in practice. A Union legislative instrument should therefore provide for some kind of solution to the jurisdictional rules, by providing efficient mechanisms for coordinating private claims and public action. For instance, it has been suggested that the court first seized of the case could be allowed to decline jurisdiction if there were a more appropriate forum to deal with the case. However, in such cases, there should be common criteria which the courts would have to consider in assessing whether they are the best placed court to handle the collective action because otherwise this option would lead to more uncertainty.¹²⁴⁴ It is suggested that the court should consider the adequacy of the representative entity bringing the representative action or of the claimants bringing the collective action to represent the injured parties. Nevertheless, the adoption

BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 275-276.

¹²⁴² See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 13.

¹²⁴³ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., "Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers" in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 276-277.

¹²⁴⁴ *Ibid.*, at p. 278-279.

of any binding measure changing the rules of *lis pendens* would be difficult to adopt in practice.

Another potentially complex issue is the existing conflict of law rules. The Rome II Regulation applies to non-contractual obligations, such as antitrust damages actions. It provides for different grounds for determining the applicable law depending on the type of claim. As to antitrust damages actions, the applicable law is the law of the country where the market is (or is likely to be) affected.¹²⁴⁵ If the market is affected in several countries, and the claimant sues in the court of the domicile of the defendant, it may choose to base its claim on the law of the court seized if the market in that Member State is directly and substantially affected.¹²⁴⁶ In this case the claimant would have the opportunity to choose between more rights of action than in the previous situation, which could result in forum shopping.¹²⁴⁷ The applicable law under Article 6(3)(b) will also be predictable, which allows the claimant to assess in advance its possibilities of obtaining compensation for the loss that it has suffered. If the claimant sues several defendants in the court seized of the case, it can only base its claim on the *lex fori* if the infringement directly and substantially affects the market in the Member State of that court.¹²⁴⁸

This means that sometimes different laws could be applicable to each group of claimants involved in the collective claim, which could make the litigation very complex. Moreover, a distinction must also be made between the law applicable to the substantive issues of the case and the law applicable to the procedural issues, since they are not determined according to the same rules. Procedural issues are usually governed by *lex fori*, the law of the court seized of the action, although EU procedural rules have become increasingly more common in some specific matters.¹²⁴⁹

¹²⁴⁵ Article 6(3) (a) of Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *OJ L* 199, 31.7.2007.

¹²⁴⁶ Article 6(3) (b) of the Rome II Regulation.

¹²⁴⁷ See TZAKAS, D-P.L., “*Collective Redress Proceedings: Specific Issues Regarding Jurisdiction and Choice of Law*” in DANOV, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 223-252, at p. 236.

¹²⁴⁸ Article 6(3) (b) of the Rome II Regulation.

¹²⁴⁹ See FERNÁNDEZ ROZAS, J.C., and SÁNCHEZ LORENZO, S., *Derecho Internacional Privado*, 7th Edition, Civitas, 2013, at p. 275-276.

However, the Commission is not considering it necessary to introduce specific rules for collective claims obliging the court to apply a single law to the case, since this could result in uncertainty if the law is not the law of the country where the claimant is domiciled.¹²⁵⁰

5.5. Admissibility of Collective Actions

The Recommendations also establish principles regarding the admissibility of collective redress actions. The admissibility of such actions should be verified as early as possible in the litigation procedure so as to discontinue collective actions which do not meet the required conditions, and manifestly unfounded actions.¹²⁵¹ The admissibility criteria are important in order to avoid abuse, and also to ensure the interest of the sound administration of justice.¹²⁵² They therefore act as safeguards which limit the cases in which collective actions may be brought. It should be borne in mind that the admissibility of collective redress mechanisms and standing to bring such actions are procedural questions, which will therefore be governed by *lex fori*. This will in turn limit the remedies available to those prescribed for domestic entities, until there is a binding Union legislative instrument harmonizing the criteria for admissibility of collective actions.¹²⁵³

The courts will have an important role in verifying the admissibility of collective actions since they should carry out the examination of their own motion.¹²⁵⁴ Overall, the courts should be keys to protecting the rights and interests of the parties to collective redress actions and in managing them effectively.¹²⁵⁵ This significant role suggested to be played by the courts in collective redress action differs from their current role in many Member States, where the basic conditions for the admissibility are established by

¹²⁵⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 14.

¹²⁵¹ Point 8 of the Recommendation on Collective Redress Mechanisms.

¹²⁵² Recital 20 of the Recommendation on Collective Redress Mechanisms.

¹²⁵³ See TZAKAS, D-P.L., "Collective Redress Proceedings: Specific Issues Regarding Jurisdiction and Choice of Law" in DANOV, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 223-252, at p. 228-229.

¹²⁵⁴ Point 9 of the Recommendation on Collective Redress Mechanisms.

¹²⁵⁵ Recital 21 of the Recommendation on Collective Redress Mechanisms.

law. Also, in those Member States which currently leave discretion to the courts concerning the admissibility of collective redress actions, the extent of discretion varies.¹²⁵⁶

Issues which the court should arguably consider when deciding on the admissibility of the collective action – in addition to the ones listed in point 4 of the Recommendations – include whether the representative entity is genuinely able to act in the best interest of the injured parties, considering potential conflicts of interest, and whether the action should be based on the “opt-in” or “opt-out” model. For instance, when their members of a representative entity are both infringers and victims of an antitrust violation, or when subgroups of victims have different interests from the ones that the representative body decides to pursue, the entity might not be able to efficiently pursue the action on behalf of all parties due to conflicts of interest.¹²⁵⁷

In cross-border cases, it has been suggested that the certification criteria should allow the court to identify the countries where the representative entities or businesses, which have joined the action, operate so as to determine whether they can adequately represent the consumers from the countries in question. The volume of sales of the cartelized products of the large purchasers, which have opted in the collective redress action, has been proposed as the criterion for determining the adequacy of direct purchasers representing consumers from the countries concerned.¹²⁵⁸

The decision of whether the collective action should be based on the “opt-in” or “opt-out” model should arguably be left to the courts of the Member States. The courts would have to verify that opt-out collective actions are not being used to bring frivolous suits, and should only allow them if it were possible to assure that no group member would have to bear the legal costs of actions that they were not aware of. The obligation

¹²⁵⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 10.

¹²⁵⁷ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

¹²⁵⁸ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 281-282.

to pay legal costs could be limited to the group representative. Exceptionally, group members which can demonstrate that they had truly not been given notice of the action could be given an opportunity to opt out from the judgment and any related legal costs at a later stage. With these safeguards put in place, the opt-out collective action should not generally pose any constitutional problems. Ultimately, national legal traditions would also be respected as national courts would decide whether or not a collective action could be brought as an opt-out action.¹²⁵⁹

5.6. Costs of Collective Actions

The main reason why collective actions are not frequently brought in the EU is the high litigation costs.¹²⁶⁰ The costs constitute a large obstacle in particular for consumers who usually have comparatively small claims in comparison to the potential high cost. Therefore they often lack sufficient incentives to bring a claim. But also small and medium-sized undertakings might face the same hurdles, especially in situations where they are indirect purchasers, and would be required to show the exact amount of the overcharge that has been passed on to them. In fact, it should be noted that opt-in collective actions can be as expensive, or even more expensive, as opt-out collective actions. For example, the Swedish opt-in collective action requires two or more notices being issued during the litigation which increases the costs. In addition, when group members are allowed to join the collective action at any time, sufficient human resources are needed in order to receive communications, and to insert the names of group members into the register.¹²⁶¹

In order to reduce the costs, the Committee on the Internal Market and Consumer Protection proposed during the legislative process which led to the adoption of the Directive on Antitrust Damages Actions that Member States should take appropriate measures to reduce costs associated with antitrust damages actions, for example, by

¹²⁵⁹ See LESKINEN, C., “Recent Developments on Collective Antitrust Damages Actions in the EU”, *G.C.L.R.*, Volume 2, No 4, 2011, p. 79-88, at p. 87.

¹²⁶⁰ See e.g. the *Mobile Cartel* in France.

¹²⁶¹ See GAUDET, R., “Turning a blind eye: the Commission’s rejection of opt-out class actions overlooks Swedish, Norwegian, Danish and Dutch experience” *E.C.L.R.*, Volume 30, Issue 3, 2009, p. 107-117, at p. 117.

limiting the level of court fees.¹²⁶² Similarly, the EESC found that the Commission should examine the existing cost rules, and that meritorious actions should be allowed if costs otherwise prevented these claims from being brought.¹²⁶³

However, the Recommendation on Collective Redress Mechanisms does not contribute much to reduce the costs of collective actions. Pursuant to the Recommendation, Member States should apply the “loser pays principle” to collective redress actions, according to which the losing party must reimburse necessary legal costs of the winning party. However, this principle will be subject to the conditions laid down in the applicable national law,¹²⁶⁴ so Member States will be allowed to provide for more generous costs rules. The possibility of derogating from the cost rules is, arguably, key to ensure that meritorious collective actions can also be brought when there is some uncertainty about the outcome of the action, and the claimant might otherwise not be willing to bring the action.

As stated above, it would also be necessary to avoid an obligation for group members to pay legal costs if they have not been reached in time to be able to opt out from the collective action. One possibility would be to design the “opt-out” model so that this obligation would be limited to the group representative and those members who have *de facto* had a possibility to exercise their right to opt out. Nevertheless, the Recommendation does not contain any principles governing the possible costs of the members of the group, so divergences at national level will continue to prevail until the European Union adopts a binding instrument establishing some common principles regarding the costs of collective redress actions.

In addition, in order to ensure access to justice and an effective remedy for parties whose rights granted under EU law have been infringed in a mass harm situation, in particular consumers, contingency fees or other forms of third party funding should be encouraged, and/or sufficient public funding should be made available to consumer

¹²⁶² See Opinion of the Internal Market and Consumer Protection on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at § 7.

¹²⁶³ See Opinion of the Committee on Legal Affairs on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 22.1.2009.

¹²⁶⁴ Point 13 of the Recommendation on Collective Redress Mechanisms.

associations. Similarly, there should be adequate incentives to bring collective actions, although they should also be subject to appropriate safeguards in order to avoid abuse.¹²⁶⁵

5.7. Damages

The guiding principle in the Directive on Antitrust Damages Actions as well as – as far as damages are concerned – in most Member States, is the principle of full compensation and the prohibition of unjust enrichment.¹²⁶⁶ The Commission also recalls that the stakeholders consulted thought that public enforcement and private collective redress complement each other and, thus, collective damages actions should only ensure compensation of the damage suffered as a result of an infringement of a right conferred by EU law, whereas the role of public enforcement is to punish and deter infringements.¹²⁶⁷

As to claims brought by collective actions, the Recommendation therefore proposes that damages awarded to a claimant harmed in a mass harm situation should not exceed the compensation that would have been obtained if it had instead been brought as an individual action. The Commission also believes that punitive damages should be prohibited.¹²⁶⁸ The Commission maintains that, in addition to punitive damages, intrusive pre-trial discovery procedures and jury awards should be avoided in general. The Recommendation also points out that most of these elements are foreign to the legal traditions of the Member States.¹²⁶⁹

The issue of punitive damages is controversial because, as has been stated in Chapter Four, the ECJ has not considered punitive damages to be contrary to European public order and, according to the principle of equivalence, they must be available for an infringement of the EU antitrust rules if they are available for an infringement of

¹²⁶⁵ For more details, see Section 5.7 on “Damages” and Section 5.8 on “Funding” below.

¹²⁶⁶ Article 2 of the Directive on Antitrust Damages Actions.

¹²⁶⁷ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 10.

¹²⁶⁸ Point 31 of the Recommendation on Collective Redress Mechanisms.

¹²⁶⁹ Recital 15 of the Recommendation on Collective Redress Mechanisms.

national competition law, and are awarded in accordance with the general principles of EU law.¹²⁷⁰ The prohibition of punitive or multiple damages at Union level therefore goes against existing EU case law, and there is no foundation to completely rule them out for all collective actions. Instead of a general prohibition of punitive or multiple damages, a case-by-case analysis should be conducted to determine whether they would be justified for certain types of infringements of rights granted under EU law. In the field of antitrust damages actions, they could be useful for hard-core cartels in order to contribute to higher deterrence of this type of the most harmful competition infringements.

As regards the distribution of damages in collective actions, the White Paper stated that, in case of representative actions, in principle, the damages should be used to compensate the harm suffered by those represented in the action. In an opt-in collective action the damages would therefore be awarded to the individually identified claimants according to the harm suffered by them.¹²⁷¹ Only exceptionally could it be necessary to reflect on the possibility to award damages to the representative entity which would distribute the damages to related entities or use them for related purposes.¹²⁷² This was suggested to be the case if it were not possible to reach all group members. In these cases, damages that had not been claimed could be used to the benefit of all group members, for example, to protect consumer interests in general, if the claimants were consumers. The so-called *cy pres* award could also be an appropriate alternative if the damages awards were too small for the distribution to each claimant to pay off.

It is worth noting that the rapporteur of the report of the Committee on Economic and Monetary Affairs on the White Paper on Antitrust Damages Actions argued that the doctrine of *cy pres* would not be compatible with the principle of only compensating damage actually suffered since it would result in damage actually incurred not being

¹²⁷⁰ See Judgment in *Manfredi*, EU:C:2006:461, paragraph 93.

¹²⁷¹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 21.

¹²⁷² The distribution of damages would hence be a *cy pres* distribution meaning that the damages are not distributed directly to those injured to compensate for the harm that they suffered, but are used to achieve a result which is as close as possible. See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 18-20.

compensated.¹²⁷³ Consequently, the rapporteur objected that a principle of *cy pres* be introduced.¹²⁷⁴ Nevertheless, the consequences of accepting this line of reasoning would be to allow the infringers to keep any unclaimed damages.

The Recommendation does not lay down any principles regarding the distribution of damages among the members of the affected group, but merely mention that overcompensation should be prohibited. The issue of distribution of damages is, however, important especially in cases involving claimants at different levels in the distribution chain and, in particular, in collective actions. There would therefore be a need to decide on how damages which cannot be distributed among the victims should be distributed. Therefore rules concerning *cy pres* distribution should be provided. There is also a call for considering if it is in line with the common sense of justice that, due to the notable fear of over-compensation which is reflected in the new directive, in situations where there might be some uncertainty about the exact amount of harm suffered, infringers are allowed to keep the part of the damages which cannot be exactly allocated to the injured parties instead of using it for a purpose benefiting the society, directly or indirectly. Arguably, a fairer outcome would be, for example, to use unclaimed damages for the benefit of the injured parties in general or to fund future collective actions for damages.¹²⁷⁵

5.8. Funding of Collective Actions

The costs of civil litigation involving multiple claimants could be comparatively high and could potentially impede access to justice if the injured parties do not have sufficient funds. In order to avoid this, there must be sufficient funding available. However, the Commission has some concerns funding mechanisms possibly creating incentives for abusive litigation. In particular, the Commission is concerned about direct third-party funding of collective redress actions, unless it is properly regulated. Such funding would include contingency fees or success fees for legal services, which also

¹²⁷³ See COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS, “Report on the White Paper on damages actions for breach of the EC antitrust rules” (2008/2154(INI)), March 9th, 2009, at p. 10.

¹²⁷⁴ See KORTMANN, J.S. and SWAAK, C.R.A., “The EC White Paper on antitrust damages actions: why the Member States are (right to be) less than enthusiastic”, *E.C.L.R.*, Vol. 30, Issue 7, 2009, p. 340-351, at p. 344.

¹²⁷⁵ This option has been chosen in the United Kingdom for the new collective redress mechanism to be introduced.

encompass preparatory action, gathering evidence, and general case management. The Commission prefers legal expenses insurance and “after-the-event” insurance, which it believes could contribute to collective actions.¹²⁷⁶

However, there are some drawbacks with the “after-the-event” insurance. If the premium is high and exceeds the litigation costs that must be paid up-front, it may discourage potential claimants from subscribing the insurance policy.¹²⁷⁷ In addition, in practice, it can be difficult to enforce an “after-the-event” insurance since insurers are likely not to be willing to pay out compensation that constitutes large amounts if there is any possibility of avoiding this.¹²⁷⁸ Due to the problems related to legal insurance¹²⁷⁹ and the need for litigation funding, third-party funding has been introduced in some Member States.

The Recommendation lays down a principle according to which the claimant should have to declare to the court at the beginning of the proceedings the origin of the funds which will be used to fund the collective action.¹²⁸⁰ The court, in turn, should be empowered to stay the proceedings in cases involving third-party funding if there is a conflict of interest between the third party and the claimant and group members; the third party’s resources are insufficient to meet its financial commitments to the claimant; or the claimant has insufficient resources to compensate the costs of the action if it fails.¹²⁸¹ The two first ones could be justified, but not the last one as such: the claimant would never be able to bring a collective action, even a meritorious one, the outcome of which is uncertain if his financial resources are insufficient to pay the possible adverse costs. In such cases, an adjustment of the cost rules should instead be possible, modelled after the German costs rules regarding antitrust damages actions,¹²⁸²

¹²⁷⁶ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Towards a European Horizontal Framework for Collective Redress”, COM(2013) 401 final, 11.6.2013, at p. 15.

¹²⁷⁷ See PEYSNER, J., “The Costs and Financing in Private Third Party Competition Damages Actions”, *CompLRev*, Volume 3(1), 2006, p. 97, at p. 99-100.

¹²⁷⁸ See KOUTSOUKIS and O’SHEA, “Litigation funding in European antitrust cases: legal and practical issues”, *G.C.L.R.*, 2009, 2(2), p. 74, at p. 78.

¹²⁷⁹ See MARTIN, “And then there were three”, *Euro. Law*, 81, 2008, p. 30, at p. 31-32.

¹²⁸⁰ Point 14 of the Recommendation on Collective Redress Mechanisms.

¹²⁸¹ Point 15 of the Recommendation on Collective Redress Mechanisms.

¹²⁸² See Section 89a of the Act Against Restraints of Competition.

or Directive 2004/48/EC on the enforcement of intellectual property rights, which provides an exception to the general rule that the “loser pays” rule if a deviation is justified by equity considerations.¹²⁸³

According to the Recommendation, the third party should be prohibited from seeking to influence the decisions of the claimant related to the proceedings, such as to accept or reject settlements. The third party should also not be allowed to finance a collective action brought against a defendant who is its competitor or on whom it depends. In addition, the interests charged on the funds should not be excessive.¹²⁸⁴ The main reason behind the conditions on funding is to avoid abuse or a conflict of interest.¹²⁸⁵

With regard to compensatory collective redress actions, the Recommendation lays down additional requirements regarding funding. In order to ensure the interests of the parties, the remuneration given to private third-party funds should not be based on the amount of settlement reached or the compensation awarded, unless the funding arrangement is regulated by a public authority. The same applies to interest charged by the fund.¹²⁸⁶ These limitations seem reasonable since conflicting interests could limit the effectiveness of cases involving third-party funders. This would in particular be the case if several stakeholders are involved, since e.g. a litigant, funder and insurer do not necessarily have the same incentives to settle or to pursue a case.¹²⁸⁷ It would be appropriate that the court verifies that the share of a possible settlement which the third-party will obtain in remuneration is reasonable.

Another important issue closely linked to the funding of collective actions is the lawyers’ fees as well as contingency fees. The principles laid down in the Recommendation reflect the Commission’s concern about abusive litigation. Therefore, the Commission recommends that the lawyers’ remuneration and the method by which

¹²⁸³ Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *OJ L 157*, 30.4.2004, p. 45–86.

¹²⁸⁴ Point 16 of the Recommendation on Collective Redress Mechanisms.

¹²⁸⁵ Recital 19 of the Recommendation on Collective Redress Mechanisms.

¹²⁸⁶ Point 32 of the Recommendation on Collective Redress Mechanisms.

¹²⁸⁷ See MARTIN, “And then there were three”, *Euro. Law*, 81, 2008, p. 30, at p. 33.

it is calculated should not create incentive to unnecessary litigation.¹²⁸⁸ According to the Recommendation, contingency fees which risk creating such incentives should not be permitted. Thus, contingency fees should only exceptionally be permitted, and in collective redress actions cases they must be regulated by appropriate national regulation, which must in particular respect the right to full compensation of the claimant and the members of the group.¹²⁸⁹ Nevertheless, without the availability of contingency fees or equivalent third-party funding, collective actions might not be brought due to the cost risks.¹²⁹⁰

The Commission's recommendations on contingency fees are too restrictive. Since public funding is decreasing,¹²⁹¹ there is a need to ensure sufficient funding of collective actions by introducing contingency fees in the EU (or by finding other alternatives) to fund collective actions. Otherwise the introduction of an EU collective redress mechanism would not be sufficiently efficient in order to significantly increase access to justice. But the Commission is right in finding that contingency fees should be subject to judicial scrutiny or be regulated in another effective manner in order to reduce their possible negative effects.¹²⁹² It should also be noted that the study entitled "Collective Redress in Antitrust" did not find that contingency fees alone, without some other procedural mechanisms available in the United States, would automatically lead to excessive litigation.¹²⁹³

Moreover, it should be noted that the Commission does not find any need for the creation of public funds which would finance potential claimants in collective redress cases. Instead, the Commission finds it sufficient, given that in the end collective actions are brought in the context of a civil dispute between two parties, that the losing party will be obliged to compensate the party which has suffered harm, provided that

¹²⁸⁸ Point 29 of the Recommendation on Collective Redress Mechanisms.

¹²⁸⁹ Point 30 of the Recommendation on Collective Redress Mechanisms.

¹²⁹⁰ In the United States, practically all class actions are brought under contingency fee arrangements. *See* Chapter Six.

¹²⁹¹ *See* HODGES, C., "Europeanization of civil justice: trends and issues", *C.J.Q.*, Issue 26 (JAN), 2007, p. 96, at p. 99-100.

¹²⁹² *Ibid.*, at p. 108.

¹²⁹³ *See* BUCCIROSSI, P., CARPAGNANO, M., CIARI, L., TOGNONI, M. and VITALE, C., "Collective Redress in Antitrust" Study, IP/A/ECON/ST/2011-19, June 2012.

the court rules in favor of the claimant.¹²⁹⁴ This view does not take into account the risks of high costs of bringing a collective redress action precisely due to the involvement of multiple parties and its complexity. Even meritorious claims might therefore risk failing, especially if they have to be brought based on the “opt-in” model, which might prevent the group of claimants from becoming sufficiently large in order for the action to pay off. As a consequence, the right of effective access to justice might thus not be ensured without providing for some sort of public funding.

The Commission’s stance can be contrasted with the opinion of the Committee on the Internal Market and Consumer Protection which suggested the creation of a fund which would finance a first ruling of a case based on evidence adduced by a claimant, and which would be financed by fines from competition infringement cases.¹²⁹⁵ This approach would facilitate bringing antitrust damages actions in meritorious cases, and would thus not entail any great risks for abusive litigation thanks to the obligation to present a plausible claim before the action could be financed from the fund. It is submitted that this option should be considered when a Union legislative instrument on EU-wide collective actions is adopted.

5.9. Collective Alternative Dispute Resolution and Settlements

The Commission finds it important that parties to a dispute in a mass harm situation should be encouraged to settle their dispute either consensually or out-of-court.¹²⁹⁶ This type of dispute resolution has the advantages of being fast, low-cost and a simple means of resolving disputes.¹²⁹⁷ Collective ADR and settlements should be possible both at the pre-trial stage and during the court trial. The requirements of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters should also be taken into

¹²⁹⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 15.

¹²⁹⁵ See Opinion of the Internal Market and Consumer Protection on the White Paper on Antitrust Damages Actions for the Committee on Economic and Monetary Affairs (2008/2154(INI)), 3.12.2008, at p. 57.

¹²⁹⁶ Point 25 of the Recommendation on Collective Redress Mechanisms.

¹²⁹⁷ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 14.

account.¹²⁹⁸ Although the Member States should ensure the availability of collective ADR to parties, there is no obligation for parties to rely on such mechanisms, but their use should always depend on the consent of the parties.¹²⁹⁹ The voluntary nature is important in order not to trigger unnecessary costs and delays, which could jeopardize the right of access to justice¹³⁰⁰ granted under Article 47 of the Charter of Fundamental Rights of the European Union. A requirement making ADR compulsory would also have the negative effect of prolonging the resolution in cases, which can clearly not be settled because of the lack of consent of the parties or some other reason.

Moreover, ADR procedures should be available alongside judicial collective redress.¹³⁰¹ Again, this is important in order to keep the length of the proceedings in check, and to provide an alternative for both parties in case they fail to settle. In addition, the fact that judicial collective redress could serve as a back-up in case settlement fails, makes it more likely that the defendant will have an incentive to settle the claim, and also to offer fairer terms of settlement as it might otherwise face litigation in court.

However, in order to encourage ADR, the Recommendation suggest that the limitation period applicable to the claims concerned should be suspended from the moment when the parties decide to have recourse to ADR in order to attempt to solve their dispute until one or both of them expressly withdraw from the ADR procedure.¹³⁰²

The legality of any collective settlement reached by the parties should be verified and confirmed by the courts, which ensures that the protection of interests and rights of all the parties has been appropriate.¹³⁰³ This recommendation aims to protect those members of the group which have not been able to participate in the consensual

¹²⁹⁸ Point 25 of the Recommendation on Collective Redress Mechanisms.

¹²⁹⁹ Point 26 of the Recommendation on Collective Redress Mechanisms.

¹³⁰⁰ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013, at p. 14.

¹³⁰¹ Recital 16 of the Recommendation on Collective Redress Mechanisms.

¹³⁰² Point 27 of the Recommendation on Collective Redress Mechanisms.

¹³⁰³ Point 28 of the Recommendation on Collective Redress Mechanisms.

collective resolution of collective dispute.¹³⁰⁴ This is vital in order to avoid that the defendant or defendants, who usually tend to be the stronger party, will not be able to force the claimant to accept a settlement for the fear of not obtaining any compensation at all unless they accept the terms of the defendant.

Encouraging collective ADR and collective settlements can have a positive effect on the possibilities of injured parties obtaining at least some compensation since they possibly offer a faster and less expensive mechanism for solving the dispute. Nevertheless, this option is only likely to be an option worth considering for claimants if they have recourse to an effective judicial collective redress mechanism to fall back on if the defendant is trying to take advantage of the usually weaker position of the injured parties.

5.10. Recognition and Enforcement of Collective Redress Judgments and Settlements

Competition-related civil proceedings fall within the scope of the Brussels I Regulation¹³⁰⁵ because they deal with civil and commercial proceedings for the purpose of Article 1. Judgments on damages actions can therefore be recognized and enforced in other Member States in accordance with Articles 33-34 of Brussels I (Articles 36, 45 of Brussels I *bis*). According to Article 33 (Article 36 Brussels I *bis*), a judgment given in a Member State must be recognized in the other Member States. But recognition may be refused if it would go against public policy.¹³⁰⁶

As mentioned above, the issue of whether punitive damages should be available is somewhat controversial. Brussels I is silent on whether punitive damages can be enforced. This can be considered as an implicit authorization of judgments awarding punitive damages, provided that one part of the foreign judgment would only be

¹³⁰⁴ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, Strasbourg, 11.6.2013, at p. 14.

¹³⁰⁵ As from January 10th, the same will apply to the Brussels I *bis* Regulation when it enters into force.

¹³⁰⁶ Article 34(1) of the Brussels I Regulation (Article 45(1) of the Brussels I *bis* Regulation). Moreover, other grounds for refusal of recognition may be found in Article 34 of the Brussels I Regulation (Article 45 of the Brussels I *bis* Regulation).

irreconcilable or contrary to public policy.¹³⁰⁷ But this issue is currently decided by national law in the EU, although in the *Manfredi* ruling the Court of Justice held that punitive damages are compatible with EU law.¹³⁰⁸ For instance, Germany considers punitive damages contrary to public policy if the amount is “not inconsiderable”. This is due to the fact that the claimant would become a private public prosecutor, which is incompatible with the State’s monopoly on punishment. This seems to imply that reasonable punitive damages could in certain circumstances possibly be recognized.¹³⁰⁹

Another possible ground for not recognizing foreign judgments rendered in the context of collective action proceedings relate to “opt-out” collective actions. In these cases, absent group members will also be bound by the resulting judgment, unless they have informed the court that they wish to opt out. The problem is that sometimes they may not be reached and, therefore, are not informed about the proceedings in time to opt out. In these cases it would go against the right to due process if they were bound. But as long as they have been informed, the settlement or the judgment should also be recognized and enforced outside the country of origin as they would not be bound by the outcome against their will.

It should also be noted that defendants generally do not tend to settle unless the collective settlement has preclusive effect, since they wish to avoid having to re-litigate the case with non-settling parties. As the law stands, the recognition of the settlement (or collective action) could be questioned based on the public policy exception laid down in Article 34(1) or the right to a fair trial under Article 34 (2) of Brussels I (Article 45(1) and 45(2) of Brussels *bis*). The uncertainty of the preclusive effect is accentuated in opt-out collective actions or opt-out settlements. In fact, in case parallel collective actions are brought in different Member States, it might not always be clear by which of the actions would identifiable parties who have not opted in to one of the collective actions be bound. It has been suggested that there should be a presumption

¹³⁰⁷ See KESSEDJIAN, C., “Recognition and Enforcement of Foreign Judgments” in BASEDOW, J., FRANCO, S and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, Oxford and Portland, Oregon, 2012, 245-256, at p. 252.

¹³⁰⁸ See Judgment in *Manfredi*, EU:C:2006:46, paragraph 93.

¹³⁰⁹ See KESSEDJIAN, C., “Recognition and Enforcement of Foreign Judgments” in BASEDOW, J., FRANCO, S and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, Oxford and Portland, Oregon, 2012, 245-256, at p. 252-253.

that the opt-out collective antitrust actions of other Member States comply with Article 6(1) of the European Human Rights Convention and Article 47(2) of the Charter of Fundamental Rights of the European Union. This presumption would be justified by the need to ensure an effective remedy to everyone “*whose rights and freedoms guaranteed by the law of the Union are violated*” under Article 47(1) of the Charter of Fundamental Rights of the European Union, as consumers would otherwise generally fail to obtain compensation.¹³¹⁰ However, it should be limited to situations where the claims could indeed not be viably enforced individually or where the claimants have had a possibility to *de facto* opt out from the collective action.

5.11. Conclusions on the Main Flaws of the Recommendation

The principles laid down in the Recommendation should be implemented in the national collective redress systems by July 26th, 2015. Member States are also recommended to collect reliable annual statistics on the number of both out-of-court and judicial collective redress procedures as well as information about the parties, the subject matter, and outcome of the actions. This information should be communicated to the Commission annually starting from July 26th, 2015.¹³¹¹ Within a year from this date, the Commission, in turn, should assess the implementation of the Recommendation on the basis of the practical experience. The issues to assess include in particular the impact of the Recommendation on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation and on the functioning of the internal market, on SMEs as well as the competitiveness of the economy of the EU and consumer trust.¹³¹² The assessment should also consider whether further measures should be suggested in order to consolidate and strengthen the chosen horizontal approach.

It is of course too early to know to what extent Member States will indeed implement the principles laid down in the Recommendation, but given that in some Member States, for example France, it took over a decade to introduce a new model of collective action, mere recommendations will probably not be sufficient to speed up the process.

¹³¹⁰ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 278-280.

¹³¹¹ Points 38-40 of the Recommendation on Collective Redress Mechanisms.

¹³¹² Point 41 of the Recommendation on Collective Redress Mechanisms.

Moreover, although the Commission Recommendation on Collective Redress Mechanisms also include welcome features, such as its horizontal approach and the possibility of applying both for collective injunctive and compensatory relief, its main flaw is that no binding EU-wide collective redress mechanism is introduced in the EU.

A binding instrument would be required in order to genuinely improve access to justice of consumers. As has been explored in the previous chapters, collective actions enable individuals to seek damages in situations where they would not be able to enforce their rights individually¹³¹³ by enabling claimants to take advantage of economies of scale thus reducing the costs and improving the access to the justice system.¹³¹⁴ They also complement the control of markets carried out by public enforcers¹³¹⁵ when they are used to seek damages for illegal conduct which public enforcement has not detected or has chosen not to pursue.¹³¹⁶ Collective actions also reduce the costs of actions. Similarly, all claims can be heard by a single judge,¹³¹⁷ which is likely to speed up the litigation for all claimants, and enhance the consistency and finality of rulings in that the same issue is resolved in an identical manner, and save the economic resources of courts and defendants by eliminating or reducing multiple claims.¹³¹⁸

Moreover the Recommendation does not go far enough because the common principles laid down are generally based on encouraging a modest form of collective actions and conservative means of funding. For instance, some of the main problems of the existing

¹³¹³ See MICKLITZ, H.-W., “Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, *Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*, Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

¹³¹⁴ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions Are Introduced in France?”, 73 *Def. Couns. J.*, July 2006, p. 301-311, at p. 306.

¹³¹⁵ See MICKLITZ, H.-W., “Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, *Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*, Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

¹³¹⁶ See CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 9.

¹³¹⁷ See OFFICE OF FAIR TRADING, “Private actions in competition law: effective redress for consumers and business”, Discussion Paper, OFT916, April 2007, at p. 21.

¹³¹⁸ See The Consumer Redress Study, at p. 265-266.

collective redress mechanisms at national level include precisely the fact that they are commonly based on the “opt-in” principle, and the costs of the actions constitute as significant barrier at least with regard to antitrust damages actions. Examples of the limited efficiency of the “opt-in” model are the *Football Shirts*¹³¹⁹ and *Mobile Cartel*¹³²⁰ cases in the United Kingdom and France which only resulted in the compensation of a small fraction of the injured parties in the first case and the failure of the second case. In fact, both cases eventually inspired these Member States to review their collective redress mechanisms, although eventually opting for divergent collective action models. The future UK collective action promises to be a frontrunner in the EU making both follow-on and stand-alone collective actions possible, and opening collective redress also for businesses as well as enabling the “opt-out” model in certain cases,¹³²¹ whereas the new French collective action will still be based on the “opt-in” model, although injured parties are allowed to opt in once the liability of the infringer has been determined.¹³²²

The Recommendation does admit exceptions to the “opt-in” principle either by law or by court order, but in those cases they must be duly justified “*by reasons of sound administration of justice*”.¹³²³ Arguably, the only effective way of ensuring an “effective remedy” for consumers under Article 47(1) of the Charter of Fundamental Rights of the European Union is to leave the decision of whether a collective redress action should be brought based on the “opt-in” or “opt-out” model to the courts, at least in cases involving numerous damages actions of low-value. In deciding on the appropriate model for bringing the action, the courts should take into account the interests of all parties and the effective management of the action. This would also allow Member States to provide for collective actions that are compatible with their legal traditions. However, appropriate safeguards, such as court scrutiny of legal fees

¹³¹⁹ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07.

¹³²⁰ See <http://www.cartelmobile.org/>.

¹³²¹ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 32-34.

¹³²² Article L. 423-3(1) of the Consumer Act.

¹³²³ Point 21 of the Recommendation on Collective Redress Mechanisms.

and settlements, must also be put in place in order to ensure the rights of unidentified group member.¹³²⁴

In addition, sufficient funding would be necessary to ensure the effectiveness of collective damages actions. The litigation costs constitute a large obstacle in particular for consumers who usually have comparatively small claims in comparison to the potential high cost, which are the main reason for why collective actions are not frequently brought in the EU.¹³²⁵ A possibility of derogating from the “loser pays” principle would, arguably, be necessary in order to ensure that meritorious collective actions can also be brought when there is some uncertainty about the outcome of the action, and the claimant might because of its financial situation not be willing to bring the action.

It would also be necessary to avoid an obligation for group members to pay legal costs if they have not been reached in time to be able to opt out from the collective action. One possibility would be to design the “opt-out” model so that this obligation would be limited to the group representative and those members who have *de facto* had a possibility to exercise their right to opt out.

The Commission’s recommendations on contingency fees are also too restrictive. Since public funding is decreasing,¹³²⁶ there is a need to ensure sufficient funding of collective actions by introducing contingency fees in the EU (or by finding other alternatives) to fund collective actions. Provided that contingency fees are subject to judicial scrutiny or regulated in another effective manner, their possible negative effects can be reduced.¹³²⁷ With these safeguards put in place, the opt-out collective action should not generally pose any constitutional problems.

¹³²⁴ See LESKINEN, C., “Recent Developments on Collective Antitrust Damages Actions in the EU”, *G.C.L.R.*, Volume 2, No 4, 2011, p. 79-88, at p. 88.

¹³²⁵ See e.g. the *Mobile Cartel* in France.

¹³²⁶ See HODGES, “Europeanization of civil justice: trends and issues”, *C.J.Q.*, 26 (JAN), 96-123, at p. 99-100.

¹³²⁷ *Ibid.*, at p. 108.

The issue of distribution of damages is also important especially in cases involving claimants at different levels in the distribution chain and, in particular, in collective actions. There would therefore be a need to decide on how damages which cannot be distributed among the victims should be distributed. It is submitted that rules concerning *cy pres* distribution should be provided.

Other issues which have not been considered in a satisfactory manner in the Commission Recommendation includes the coordination of public and private actions in a cross-border situation and the jurisdictional rules. Regarding the coordination of actions in those areas of law in which a public authority can adopt a decision finding that there has been a violation of EU law, instead of obliging the court seized with the compensatory collective redress action to wait until the public enforcement action has been definitively concluded, or to stay the proceedings, it is submitted that the national authority should be able to act as an *amicus curiae* (provided that the national court approves its intervention in the proceedings) so as to not automatically prolong the collective redress proceedings or to impede stand-alone actions. This is justified especially in those cases where the decision by a national competition authority establishing an infringement does not assess whether the infringement has actually caused harm since, as a result, its file might be of limited value for proving the damage. Moreover, it would be necessary to ensure the coherent and uniform application of the EU antitrust rules when proceedings are brought before an NCA of one Member State and, simultaneously, an antitrust damages action is brought before a court of another Member State.¹³²⁸

In cross-border cases, the different jurisdictional rules under the Brussels I and Brussels I *bis* Regulations makes forum shopping possible and cause uncertainty for the defendants, whereas the possibility of torpedo actions can undermine effective access to justice for claimants. However, the Commission has not proposed any amendments to these rules, although there would arguably be a need for efficient mechanisms for coordinating private claims and public action. The only measure laid down in the Recommendation is the general obligation to stay private collective claims until public

¹³²⁸ See DANOVA, M. and BECKER, F., “*The Way Forward: A Strong Case for Reform at EU Level*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 407-420, at p. 416-417.

enforcement has been concluded. It has been suggested that a more appropriate measure could be to modify the *lis pendens* rule by allowing the court before which a collective redress action is brought to decline jurisdiction of the case if there is a more appropriate forum available which could deal more efficiently with the case.¹³²⁹ However, instead of modifying the *lis pendens* rule, which would be very challenging, a first step could be for the Commission to recommend that national courts should be able to request the opinion of the relevant public authorities even if they are not from the same Member State.

In 2016, when the Commission is to assess the implementation of the Recommendations on the basis of the practical experience from the Member States, it should also address all the issues examined above, and propose a binding Union legislative measure introducing an efficient EU-wide collective action applicable in cross-border mass harm situations. In designing that collective action, the role of class actions in private antitrust litigation in the United States and Canada should be examined in order to learn how that model could be adjusted to the EU, and serve as a remedy to some of the difficulties that consumers and other victims of antitrust violations are currently encountering in the EU.

¹³²⁹ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 278-279.

PART III: ENHANCING PRIVATE ENFORCEMENT OF THE EU ANTITRUST RULES BY LEARNING FROM THE U.S. AND CANADIAN EXPERIENCES

6. DRAWING LESSONS FROM THE U.S. AND CANADIAN EXPERIENCES

6.1. Overview of Private Enforcement in the United States and Canada

6.1.1. United States

Contrary to the situation in the European Union, in the United States antitrust rules are predominantly enforced by private litigants. Private antitrust litigation is estimated to account for more than 90% of antitrust enforcement.¹³³⁰ However, as private enforcement may also have an effect on public enforcement or vice versa, it is appropriate to briefly recall a few distinctive features of the US system of antitrust enforcement before turning to analyzing private enforcement.

The Antitrust Division of the U.S. Department of Justice enforces, civilly and criminally, §§ 1 and 2 of the Sherman Act, which principally correspond to Articles 101 and 102 TFEU. Furthermore, the Federal Trade Commission (“FTC”) investigates and civilly prosecutes the same conduct under § 5 of the Federal Trade Commission Act.¹³³¹ The Department of Justice and the FTC can also bring actions in federal courts seeking equitable relief for substantive, non-criminal antitrust violations. The equitable monetary remedies may include restitution and disgorgement, and the FTC has exercised this possibility in some cases in which it was likely that other remedies would not fully accomplish the purposes of antitrust laws.¹³³² In addition, the Department of Justice can seek damages for any antitrust injury that the United States has suffered in

¹³³⁰ See LANDE, R.H., “Benefits of private enforcement: empirical background” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

¹³³¹ See GINSBURG, D.G., “Comparing antitrust enforcement in the United States and Europe”, *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 428-429.

¹³³² See ANTITRUST MODERNIZATION COMMISSION, “Report and Recommendations”, April 2007, at p. 286.

its business or property.¹³³³ Generally, the federal agencies may, however, only bring private actions for injunctive relief regarding the infringer's future conduct.¹³³⁴

Enforcement action by a federal agency does not preclude states or private litigants from bringing actions regarding the same issue challenging the conduct, or applying for injunctive relief or seeking damages.¹³³⁵ If parallel actions are brought, federal courts, which have exclusive jurisdiction over federal antitrust laws,¹³³⁶ usually allow the state proceedings to be resolved before the federal proceedings are continued. The courts may also transfer cases to each other to ensure that the best positioned court hears the case. In addition, the parties and district judges can request a special court, the Judicial Panel on Multi-District Litigation, to consolidate related cases from multiple districts for pre-trial proceedings in one US district court.¹³³⁷ But it should be noted that *parens patriae* actions brought by state enforcers on behalf of the citizens of the state in order to seek compensation for the aggregate damage suffered by them are not governed by the Class Action Fairness Act of 2005. In other words, *parens patriae* actions can be dealt by a state court, while private class actions may be removed to federal court.¹³³⁸

¹³³³ 15 U.S.C.15a.

¹³³⁴ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 298.

¹³³⁵ See MCCURDY, G.V.S., "The impact of modernization of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective", *E.C.L.R.*, Volume 25, Issue 8, 2004, p. 509-517, at p. 513. The US Supreme Court has nevertheless held that states are not entitled to recover damages for injury to their general economies. See *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972).

¹³³⁶ It should, however, be noted that decisions of one Federal Court of Appeals do not bind other Federal Court of Appeals (i.e. the United States Circuit Courts of Appeals). If there are conflicts on legal issues among the circuits, they are generally resolved by the Supreme Court granting a writ of certiorari. See JONES, C.A., "A New Dawn for Private Competition Law Remedies in Europe? Reflections from the US" in EHLERMANN, C-D., and ATANASIU, I. (eds.), *European Competition Policy Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oregon, 2003, p. 95-108, at p. 100.

¹³³⁷ See MCCURDY, G.V.S., "The impact of modernization of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective", *E.C.L.R.*, Volume 25, Issue 8, 2004, p. 509-517, at p. 513.

¹³³⁸ See O'CONNOR, K.J., RENFRO, H.L. and BRIGGS, A.C., "Interaction of public and private enforcement" in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 240-263, at p. 255.

States have also enacted their own antitrust laws.¹³³⁹ This is possible because federal antitrust laws are not intended to preempt state laws in this field.¹³⁴⁰ Most of the state antitrust laws are comparable to §§ 1 and 2 of the Sherman Act. Furthermore, the states must not allow conduct that is unlawful under federal antitrust law, but they may apply stricter state laws by prohibiting conduct that does not violate any federal law, and may interpret federal law more aggressively. As a consequence, different enforcement approaches have been adopted in certain issues at state level.¹³⁴¹ For instance, many states allow indirect purchasers to recover treble damages, whereas indirect purchasers lack standing under federal law.¹³⁴² Moreover, federal courts may certify questions to state courts, and are obliged to defer to states interpretation of state law.¹³⁴³ However, significant conflicts between federal and state courts have been avoided, most likely due to the limited resources of the states, and thanks to the Executive Working Group for Antitrust, comprising the heads of the Federal Trade Commission and of the Antitrust Division, and five State Attorneys General, which promotes federal and state coordination, and shares information and resources.¹³⁴⁴

However, although the Department of Justice and the FTC as well as states have jurisdiction to bring antitrust suits, and exercise this right, actions brought by private litigants predominate, resulting in over 90% of the antitrust enforcement.¹³⁴⁵ In fact,

¹³³⁹ See GINSBURG, D.G., “Comparing antitrust enforcement in the United States and Europe”, *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 429.

¹³⁴⁰ See *California v. ARC America Corporation*, 490 U.S. 93 (1989), and AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 90.

¹³⁴¹ See GINSBURG, D.G., “Comparing antitrust enforcement in the United States and Europe”, *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 429-430.

¹³⁴² See MCCURDY, G.V.S., “The impact of modernization of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective”, *E.C.L.R.*, Volume 25, Issue 8, 2004, p. 509-517, at p. 512. A majority of U.S. states permit indirect purchasers to bring actions in state courts. See Antitrust Modernization Commission, Report and Recommendations, April 2007, at p. 269.

¹³⁴³ See MCCURDY, G.V.S., “The impact of modernization of the EU competition law system on the courts and private enforcement of the competition laws: a comparative perspective”, *E.C.L.R.*, Volume 25, Issue 8, 2004, p. 509-517, at p. 511.

¹³⁴⁴ See GINSBURG, D.G., “Comparing antitrust enforcement in the United States and Europe”, *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, p. 431-432.

¹³⁴⁵ See LANDE, R.H., “Benefits of private enforcement: empirical background” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4. At its peak, private antitrust litigation accounted even for 95% of the antitrust enforcement. See BUXBAUM, H.L., “Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement

private enforcement of antitrust laws plays a significantly stronger role in the US than anywhere else in the world. The reason for this is mainly considered to be the availability of treble damages and litigation costs and attorneys' fees to the successful plaintiffs, and the existence of a class action mechanism,¹³⁴⁶ which incentivize private litigants to bring actions.

Sec. 4 of the Clayton Act provides an extensive right to anybody injured in his business or property by an antitrust violation to recover treble damages, the cost of the lawsuit, and a reasonable attorney's fee. In addition to private litigants, i.e. undertakings and consumers, as mentioned above, the Department of Justice also has standing to sue for damages if the United States has suffered an antitrust injury in its business or property.¹³⁴⁷ Similarly, a state, also in its capacity as a consumer of goods and services, is considered a "person" within the meaning of Sec. 4 of the Clayton Act.¹³⁴⁸ Consequently, states can recover damages for state entities if they have been directly injured.¹³⁴⁹ Also foreign governments may have standing to sue for damages, but they may only recover actual, not treble damages.¹³⁵⁰

Moreover, State Attorneys General can bring *parens patriae* lawsuits on behalf of the citizens of the state in question to recover treble the aggregate damages suffered by these citizens.¹³⁵¹ If citizens wish to bring an independent action, they can opt out from the state suit. Any award to the state must exclude damages obtained by, or allocable to, citizens who have already sued, citizens who have opted out, and all business entities. Damages in price-fixing cases may be proved in the aggregate and, therefore, it is not

of *EC Competition Law*", in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 41-60, at p. 44.

¹³⁴⁶ See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, at p. 241.

¹³⁴⁷ Section 4A of the Clayton Act, 15 U.S.C. § 15a.

¹³⁴⁸ See *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251 (1972).

¹³⁴⁹ See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, at p. 241.

¹³⁵⁰ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 36.

¹³⁵¹ See GINSBURG, D.G., "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 429.

necessary to separately prove the damage of each purchaser.¹³⁵² In accordance with the court's directions, the state will either distribute the award as authorized by the court, or retain it as a civil penalty and deposit it in its general revenues. In either case, all injured parties must have been given the opportunity to receive an appropriate share of the monetary relief.¹³⁵³

Sec. 4 of the Clayton Act hence provides for extensive standing, but U.S. courts have limited standing for several reasons. For example, they have feared chains of recoveries resulting in multiple liabilities for the same injury that would make it difficult for courts to determine the amount and source of remote injuries. Furthermore, especially in cases brought by remotely injured plaintiffs, courts have been reluctant to punish a defendant when its infringement was minor or made in good faith, since they would be obligated to award treble damages if the defendant were found guilty. Courts have also not been willing to initiate a lengthy trial on elusive issues brought by remote plaintiffs.¹³⁵⁴

Furthermore, the U.S. Supreme Court has held that not all injuries resulting from antitrust violations give cause to a remedy in damages under Sec. 4 of the Clayton Act. In order to have standing to bring a claim for damages, a two-step procedure is applied to assess the plaintiff's harm, the alleged wrongdoing of the defendants, and the relationship between them.¹³⁵⁵ The plaintiff must demonstrate that it has suffered a so-called antitrust injury, and that it is an efficient enforcer of the antitrust laws.¹³⁵⁶ An "antitrust injury" is an injury or threatened injury caused by the defendant's illegal

¹³⁵² See AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 67.

¹³⁵³ 15 U.S.C. § 15e.

¹³⁵⁴ See AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 60. For instance, if the immediate victim is a city, indirectly injured taxpayers have not been granted standing since the city would be in a better position to bring the damages claim itself. *Ibid.*, at p. 64.

¹³⁵⁵ See *Associated General Contractors v. California State Council for Carpenters*, 459 U.S. 519 (1983). The damages action was brought by a labor union, which claimed that it had suffered harm as a consequence of a conspiracy among non-union builders to coerce property owners awarding building contracts and other general contractors to give some of their business to firms that did not belong to a union. The Supreme Court denied standing because "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general", at § 542.

¹³⁵⁶ See GOETZ, C.J. and MCCHESENEY, F.S., *Antitrust Law: Interpretation and Implementation*, Foundation Press, New York, 2006, at p. 786.

conduct, and “of the type that the antitrust laws were intended to prevent.”¹³⁵⁷ Therefore, for example, a plaintiff cannot seek damages for an injury which results from lawful competition from the defendant since the purpose of the antitrust laws is not to prevent such competition.¹³⁵⁸

The aim of antitrust laws is also not to protect competitors.¹³⁵⁹ Furthermore, according to the *in pari delicto* doctrine, the plaintiff is often not considered to have suffered an antitrust injury if it has participated in an antitrust violation, and it is co-initiator or equal participant in the defendant’s illegal conduct.¹³⁶⁰ If a party to an agreement does not fulfill a contractual obligation because it is violating an antitrust rule, due to the so-called dirty-hands defense, the other party cannot invoke legal and equitable claims arising from the unlawful provision.¹³⁶¹

The purpose of the efficient enforcer requirement is to determine whether a party is a proper plaintiff in a specific case. In order to assess this, the directness or indirectness of the injury is considered since it takes into account the remoteness of the harm alleged by the plaintiff.¹³⁶² The plaintiff must also be able to enforce an antitrust judgment efficiently and effectively.¹³⁶³ Because of this requirement, the Supreme Court held in *Illinois Brick*¹³⁶⁴ that indirect purchasers do not have standing to bring damages actions for antitrust violations. It held that rules on passing-on, which generally deny the

¹³⁵⁷ See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), at § 489.

¹³⁵⁸ See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977).

¹³⁵⁹ See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). In this case the U.S. Supreme Court held that resale price maintenance agreements could not be challenged in order to protect competing dealers, but breached § 1 of the Sherman Act because the dealers involved in the agreement could not decide the prices of their services, which caused harm to consumers by depriving them of the services they desired.

¹³⁶⁰ See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), and AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 70-71.

¹³⁶¹ See AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 71. It should be recalled that in the EU it would not be possible to limit standing to claimants, who have suffered an “antitrust injury” in the sense of the U.S. antitrust law, since Articles 101 and 102 TFEU have direct effect and, consequently, the scope of the private remedy must be equal to the substantive reach of the Treaty provisions. See JONES, C.A., *Private Enforcement of Antitrust Law in the EU, UK and the USA*, Oxford University Press, New York, 1999, at p. 192-193.

¹³⁶² See *Associated General Contractors v. California State Council for Carpenters*, 459 U.S. 519 (1983).

¹³⁶³ See *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th CIR. 1991).

¹³⁶⁴ See *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

passing-on defense except in certain limited circumstances,¹³⁶⁵ must be applied equally to plaintiffs and defendants in order to avoid multiple liabilities for defendants. The prohibition to rely on passing-on defense aims to ensure the effective enforcement of antitrust laws by “concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it”.¹³⁶⁶ The Supreme Court reasoned that allowing all potential victims to sue for damages would entail the risk of undermining private enforcement due to the complexity of demonstrating the damage suffered by each purchaser involved.¹³⁶⁷

However, the result is that direct purchasers who have passed on the overcharge to their own customers may claim compensation, although they have not necessarily suffered any harm since they have been able to recover the overcharge from their customers. Conversely, indirect purchasers, especially final consumers, who have been injured by the antitrust violation, would not be able to seek redress. It is debatable whether excluding indirect purchasers from seeking damages may be justified by the need to ensure “efficient” enforcement.¹³⁶⁸ It is submitted that it should be examined how to also make indirect purchasers efficient enforcers as treble damages were principally meant to be a remedy for individuals, consumers in particular.¹³⁶⁹ Taking into account that there have been technological advances since *Illinois Brick*, which makes it significantly easier, and less costly, to identify and compensate indirect purchasers,¹³⁷⁰ to categorically deny them standing to seek damages for antitrust violations does not

¹³⁶⁵ See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

¹³⁶⁶ See *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), at § 735.

¹³⁶⁷ See BUXBAUM, H.L., “Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law”, in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 46.

¹³⁶⁸ Conversely, in the EU, it is not compatible with EU law to exclude indirect purchasers’ right to seek damages if they have been harmed by an antitrust violation. As explained in Section 2.1, the Court of Justice held in *Courage* that the right to compensation is open to any individual injured by infringements of the EU competition rules. It explicitly justified this extensive Union right to damages as a requirement for the full effectiveness of the EU competition rules. See Judgment in *Courage*, EU:C:2001:465, paragraph 26. Interestingly, it thus came to the exact opposite conclusion than the U.S. Supreme Court as regards the effective enforcement of antitrust laws, since indirect purchasers also have standing under EU law to bring antitrust damages actions.

¹³⁶⁹ See *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), at § 754.

¹³⁷⁰ See RICHARDS, J.D., “What makes an antitrust class action remedy successful?: a tale of two settlements”, *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 624.

seem justified. This is exemplified by *Relafen*¹³⁷¹ in which databases maintained by retail pharmacies and pharmacy benefit managers served to establish that consumers had paid more than \$60 million for Relafen and its generic equivalent, and to locate more than 900,000 purchasers.¹³⁷²

Nevertheless, ultimately the decision whether to allow indirect purchasers to bring antitrust damages actions will depend on whether the deterrent effect or the compensatory function of such actions is considered more important.

Following the *Illinois Brick* ruling, many states enacted legislation allowing indirect purchasers to bring antitrust damages actions. In other states, courts interpreted existing state laws to permit indirect purchasers to seek damages. Today, a majority of the states grant indirect purchasers standing to bring damages actions under state law.¹³⁷³ This has been considered lawful by the Supreme Court, since *Illinois Brick* only construes federal antitrust law and does not pre-empt state indirect purchaser statutes.¹³⁷⁴ As a result, indirect purchasers might have standing at the state level.

Because of *Illinois Brick*, direct purchasers usually sue in federal courts, and indirect purchasers in state courts, which gives rise to duplicative litigation regarding claims resulting from the same antitrust violation, which in turn wastes resources and increases the costs of the litigation. Moreover, there is a risk that defendants will be forced to pay multiple recoveries and the damages awarded are inconsistent.¹³⁷⁵

Today, defendants may under the Class Action Fairness Act of 2005 (“CAFA”) also remove certain indirect purchaser class actions to federal court, and to consolidate them with other actions under the multi-district litigation process¹³⁷⁶ to pre-trial

¹³⁷¹ See *Relafen Antitrust Litig.*, 346 F. Supp. 2d.

¹³⁷² See RICHARDS, J.D., “What makes an antitrust class action remedy successful?: a tale of two settlements”, *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 626-627.

¹³⁷³ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 268-269.

¹³⁷⁴ See *California v. ARC America Corp.*, 490 U.S. 720 (1989).

¹³⁷⁵ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 266 and 271.

¹³⁷⁶ *Ibid.*, at p. 269.

proceedings.¹³⁷⁷ Once the pre-trial proceedings have concluded, the cases will be split up again and returned back to the originating courts for trial. But many actions may remain in state court because it is also possible for plaintiffs to object to removal of the case under the CAFA.¹³⁷⁸ Moreover, the CAFA grants federal courts original jurisdiction of any civil action in which the matter in controversy exceeds the value of \$5,000,000, and is a class action involving parties, or party members from different states or foreign states, or a party or party member who is a foreign state.¹³⁷⁹

Since divergent federal and state policies on indirect purchaser damages actions raise problems, the Antitrust Modernization Commission¹³⁸⁰ recommended that *Illinois Brick* and *Hanover Shoe* should be overruled to the extent necessary so as to allow both direct and indirect purchasers to bring claims for damages resulting from violations of federal antitrust law. It found this justified taking into account the principles of federalism, the desire to compensate actually injured parties, and practical feasibility. Actions brought by indirect purchasers when direct purchasers are not willing to sue would serve to supplement enforcement by direct purchasers, thus providing additional deterrence.¹³⁸¹

The Antitrust Modernization Commission also suggested that the aim should be to hear all claims arising out of the same alleged antitrust violation in one federal court, to the maximum extent possible, in order to make the direct and indirect purchaser litigation more efficient and fairer. Single proceedings to determine liability and damages and the allocation of damages would also make it easier to reach a global settlement. In order not to make class certification of purchaser classes more difficult, the degree of passing-on should not be decided at the class certification stage, but only at trial. In other words,

¹³⁷⁷ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998). The pre-trial proceedings deal with issues such as discovery, class certification, and summary judgment motions.

¹³⁷⁸ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 270-272.

¹³⁷⁹ Sec. 4(d)(2) of the CAFA, 28 USC § 1332. It is also possible to remove the class action from a federal court to a state court when the class action shows particularly strong links to the state in question because a large number of the class members and primary defendants are citizens of that state. Sec. 4(d)(3) and 4(d)(4) of the CAFA, 28 USC § 1332.

¹³⁸⁰ The Antitrust Modernization Commission was established to examine whether the antitrust laws should be modernized, and to identify and study related issues. See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 1.

¹³⁸¹ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 270-275.

direct purchaser classes should be certified without assessing at that stage whether the damage has been passed on.¹³⁸²

6.1.2. Canada

Canada has a much shorter tradition of private enforcement than the United States as it has only been possible to bring antitrust damages actions since 1976.¹³⁸³ Damages actions were also not common before the introduction of class actions.¹³⁸⁴ Today, class actions especially in cartel cases are more frequent.¹³⁸⁵ The reason for the initial lack of private enforcement is believed to have been due to uncertainty about the initial constitutionality of the civil right to damages for antitrust violations,¹³⁸⁶ the lack of multiple damages, and limited number of jury trials.¹³⁸⁷ Similarly, class actions and contingency fees were generally not allowed, with the exception of few jurisdictions.¹³⁸⁸

Moreover, damages actions are limited to cases of criminal anti-competitive conduct,¹³⁸⁹ i.e. under Canadian law it is not possible to sue for damages in cases involving abuse of dominance. Follow-on damages actions are possible provided that they are brought within two years from the date when the criminal proceedings

¹³⁸² *Ibid.*, at p. 275-278.

¹³⁸³ Combines Investigation Act, RSC 1970, c. C-23. Today the right to antitrust damages actions is provided by Subsection 36(1) of the Canadian Competition Act, R.S., 1985, c. C-34.

¹³⁸⁴ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 205.

¹³⁸⁵ See WRIGHT, C.M. and BAER, M.D., “Price-fixing Class Actions: A Canadian Perspective”, *Loy. Consumer L. Rev.*, 16, 2004, p. 463-478, at p. 463, and HUTTON, S., “Chapter 3. Canada” in KNABLE GOTTS, I., (ed.), *The Private Competition Enforcement Review*, 2nd edition, Law Business Research, London, 2009, p. 30-49, at p. 30.

¹³⁸⁶ This doubt was eliminated by the Supreme Court in Canada in *General Motors of Canada* in 1989. See *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors of Canada*].

¹³⁸⁷ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 205.

¹³⁸⁸ Quebec was the only Canadian province providing for class actions until 1992. See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 205.

¹³⁸⁹ This would include conspiracy and bid-rigging. See Section 36 of the Canadian Competition Act.

regarding the antitrust violation have ended.¹³⁹⁰ The record of the criminal proceedings can be used as evidence of the antitrust violation, although this presumption may be rebutted by the defendant.¹³⁹¹ Most damages claims in Canada have been initiated after a public enforcement action has started in Canada, the United States, and/or the European Union.¹³⁹²

Antitrust damages actions can be brought before the Federal Court or a provincial superior court. But since the Federal Court does not have jurisdiction to decide common law torts, which include intentional interference with economic interests, especially class actions are often brought before the provincial superior courts. This makes it possible to invoke both a cause of action under Section 36 of the Competition Act and non-federal common law claims before such courts. The procedural rules applicable in the provinces are different – most notably only Quebec is a civil law jurisdiction¹³⁹³ – which makes the Canadian case interesting for the analysis of antitrust damages actions in the European Union as the EU Member States also apply divergent procedural rules for the enforcement of the EU antitrust rules.

A Canadian provincial superior court will have jurisdiction over an antitrust damages action if there is a “*real and substantial connection*” between the province in question and the subject matter of the action. Since there is no equivalent to the U.S. multi-district litigation procedure, a defendant might have to litigate antitrust damages claims in all provinces and territories of Canada.¹³⁹⁴ But in multi-jurisdictional class actions, or if a proposed multi-jurisdictional action has been initiated in another province of Canada, the class proceedings legislation of Saskatchewan requires the court, when

¹³⁹⁰ Subsection 36(4)(a)(ii) of the Competition Act.

¹³⁹¹ Subsection 36(2) of the Competition Act.

¹³⁹² See WRIGHT, C.M., “Canada” in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 448.

¹³⁹³ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 214.

¹³⁹⁴ *Ibid.*, at p.214- 215.

deciding on the certification of the class, to examine whether all, or some of the claims, or common issues of the class could more adequately be determined in that action.¹³⁹⁵

In general, the limitation period for bringing an antitrust damages action will be two years from the date of the impugned conduct, or the date on which criminal proceedings relating to the conduct were finally disposed of, whichever is later.¹³⁹⁶ The Federal Court has held that the limitation period will start to run regardless of whether the claimant knew about the cause of action.¹³⁹⁷ For continuing infringements, the limitation period will only start to run once there are no longer ongoing acts, which themselves constitute an offence under Part VI of the Competition Act.¹³⁹⁸ Finally, it should be noted that the Crown's ability to bring criminal proceedings is not subject to any limitation period. As a result, follow-on actions could potentially be brought much later than two years from the date when the violation has already ceased, if the Crown decides to initiate criminal proceedings.¹³⁹⁹

Although there has been some development, the procedural features that are distinctive for the U.S. private antitrust enforcement are still more limited in Canada.¹⁴⁰⁰ For instance, Canada does not provide for treble damages, and the majority of antitrust cases are decided by judges, not juries.¹⁴⁰¹ Discovery rights are less extensive than in the

¹³⁹⁵ See WRIGHT, C.M., "Canada" in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 453.

¹³⁹⁶ Subsection 38(4) of the Competition Act.

¹³⁹⁷ 2010 FC 996 [*Garford*], paragraphs 31-33.

¹³⁹⁸ 2010 FC 996 [*Garford*], paragraphs 39-45.

¹³⁹⁹ See FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 210.

¹⁴⁰⁰ See OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, Policy Roundtables, "Private Remedies", 2007, DAF/COMP(2006)34, January 11th, 2008, at p. 373.

¹⁴⁰¹ See WATSON, G. D., "Class actions: the Canadian experience, *Duke J. Comp. & Int'l L.*, 11, Spring/Summer 2001, p. 269-287, at p. 269 and FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 212.

United States,¹⁴⁰² and especially before the certification of the class, the claimant will have to rely on other sources for evidence.¹⁴⁰³ Nowadays contingency fees are allowed.

Other legislative amendments in the past few years are also likely to contribute to an increase in antitrust damages actions in Canada. Cartel enforcement is today considered a high priority,¹⁴⁰⁴ and the Canadian Competition Act contains a *per se* cartel offence which is sanctioned by high fines, and 14-year imprisonment for individuals.¹⁴⁰⁵ Furthermore, indirect purchasers have sometimes been denied standing to bring antitrust damages actions and, instead, direct purchasers have been allowed to claim damages for the whole overcharge.¹⁴⁰⁶ In other words, Canadian case law has adopted the same approach to antitrust damages actions by indirect purchasers as the U.S. Supreme Court did in *Illinois Brick*. The reasoning is similar to *Illinois Brick*; the aim is to avoid multiple recoveries, and the complexity of determining the exact amount of harm of each injured party. The positive effect of this approach is that it will be easier for direct purchasers to meet the burden of proof,¹⁴⁰⁷ although the drawback is that the actual victims of the antitrust violation will not be compensated for the loss that they have suffered.

But the issue of whether indirect purchasers have standing to bring antitrust damages actions is not completely clear, and it is also linked to the issue of whether the passing-on defense is allowed. In *Chadha*, the Court still stated that an indirect purchaser class could be certified if the pass-on to indirect purchasers could be proven on a class-wide

¹⁴⁰² See OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, Policy Roundtables, “*Private Remedies*”, 2007, DAF/COMP(2006)34, January 11th, 2008, at p. 373.

¹⁴⁰³ See WRIGHT, C.M., “*Canada*” in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 455-456.

¹⁴⁰⁴ See FACEY, B.A. and ROSNER, D., “*Collective Redress for Cartel Damages in Canada*” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 206.

¹⁴⁰⁵ Canadian Competition Act, s 45(2).

¹⁴⁰⁶ (2003), 63 O.R. (3d) 22 (CA) [*Chadha*].

¹⁴⁰⁷ See FACEY, B.A. and ROSNER, D., “*Collective Redress for Cartel Damages in Canada*” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 208.

basis,¹⁴⁰⁸ i.e. in certain cases such claims would be possible. On the other hand, in *Canfor* the Supreme Court of Canada concluded that the defendant cannot invoke the passing-on defense against a direct purchaser,¹⁴⁰⁹ but in *Pro-sys Consultants Ltd v Microsoft Corporation* the Court held that the passing-on could be used offensively, i.e. as a sword by indirect purchasers, even if it could not be used as a defense.¹⁴¹⁰ As one commentator has submitted, it seems illogical, on the one hand, to deny the passing-on defense due to the complexity it might entail but, on the other hand, to allow indirect purchaser claims despite the same complexity involved in establishing the pass-on.¹⁴¹¹ The result appears to be that indirect purchaser class actions are permitted, provided that they meet the evidentiary burden of demonstrating a class-wide pass-on of the price overcharge to the indirect purchasers in question.

The burden of proof in civil matters is the so-called “preponderance of evidence” standard. The claimant will have to prove the case by a preponderance of probability, and the degree of probability required will, in turn, depend on the subject-matter at issue. If the damage results from a criminal act, as would be the case for antitrust damages actions based on Section 36 of the Competition Act, the degree of probability which has to be demonstrated will be higher.¹⁴¹²

The Canadian class action is based on an “opt-out” model as the US class action.¹⁴¹³ All provinces also have either class actions or representative actions,¹⁴¹⁴ and the Supreme

¹⁴⁰⁸ (2003), 63 O.R. (3d) 22 (CA) [*Chadha*], a § 56.

¹⁴⁰⁹ *British Columbia v Canadian Forest Products Ltd*, [2004] 2 SCR 74 [*Canfor*].

¹⁴¹⁰ 2011 BCCA 186 [*Pro-Sys*].

¹⁴¹¹ MACLEAN, J., “Hannover Shoe, retreaded: economic complexity, judicial competence, and procedural purity in Canadian competition law (Part Two)”, *G.C.L.R.*, 7(2), 2014, p. 79-93, at p. 89.

¹⁴¹² See [1986] 1 SCR 103 [*Oaks*] and FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 213.

¹⁴¹³ See OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, Policy Roundtables, “Private Remedies”, 2007, DAF/COMP(2006)34, January 11th, 2008, at p. 373.

¹⁴¹⁴ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 205.

Court of Canada has held that courts in a province which merely provides for representative actions can adopt class actions procedures on an *ad hoc* basis.¹⁴¹⁵

Interestingly, claimants' lawyers in the United States and the Canada have also started to increasingly coordinate class actions.¹⁴¹⁶

6.2. Lessons to Learn from the U.S. and Canadian Experiences

6.2.1. General Observations

Given that private enforcement of antitrust rules plays a remarkably more significant role in the United States, and is also increasing in Canada, the European Union could learn from the U.S. and Canadian experiences of private antitrust enforcement. In particular, the role of class actions, contingency fees, and discovery in strengthening private enforcement merit analyzing, since these features are distinctive of the private enforcement models in the United States and in Canada. The U.S. and Canadian experiences could serve to determine whether the class actions, or other forms of procedural devices available in the U.S. and Canadian legal systems, should be introduced in the EU in order to enhance private enforcement.

Canada has also partly chosen a different private enforcement model, which is – from a European view point – a more moderate model of private enforcement. As stated, damages actions are limited to cases of criminal anti-competitive conduct. Moreover, the procedural features that are distinctive for the US private antitrust enforcement are also more limited in Canada.¹⁴¹⁷

6.2.2. Discovery

Access to evidence is one of the crucial prerequisites in order to bring an antitrust damages action as proof of a plausible claim is required. In the United States, access to

¹⁴¹⁵ See *Western Canadian Shopping Centres Inc v Dutton* [2001] 2 SCR 534.

¹⁴¹⁶ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 206.

¹⁴¹⁷ See OECD, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS, COMPETITION COMMITTEE, Policy Roundtables, “Private Remedies”, 2007, DAF/COMP(2006)34, January 11th, 2008, at p. 373.

evidence is generally obtained through discovery, and the pre-trial discovery is very extensive. The reason for the extensive pre-trial discovery is the requirement that the trial must be a single, uninterrupted event, which can be concluded within a limited time since the trial is decided by jurors.¹⁴¹⁸

In the United States, the trial in civil – as well as in criminal – cases is based on an adversary system, which requires each party to investigate and present the evidence it wishes to rely on. The judge's role is merely to ensure that the rules of evidence are observed, and to decide the case based on the arguments and evidence submitted by the parties, but the judge must not him or herself play an active role in investigating and gathering evidence.¹⁴¹⁹

As it falls upon each party to prove its claim, it could be burdensome if it were not for discovery. Discovery consists of an exchange of information between the parties the purpose of which is to enable both parties to obtain knowledge of the factual and legal issues involved in the case.¹⁴²⁰ The requirements for accepted evidence are fairly lax.

At federal level, the rules governing discovery in civil cases are laid down in the Federal Rules of Civil Procedure ("FRCP"). In addition, the states have their own rules of civil procedure, although they are usually very similar to the FRCP.¹⁴²¹ When a plaintiff brings a claim, it must generally provide 1) a statement of the grounds for the court's jurisdiction; 2) a statement of the claim showing that it is entitled to relief; and 3) a demand for the relief sought.¹⁴²² This is usually followed by the so-called "notice pleading" where the plaintiff is required to give fair notice to the defendant of its claim and – in very general terms – the grounds upon which it is based. However, in some

¹⁴¹⁸ See ZEKOLL, J., "Comparative Civil Procedure" in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1335.

¹⁴¹⁹ See BURNHAM, W., *Introduction to the law and legal system of the United States*, Fifth Edition, West, St. Paul, 2011, at p. 82-83.

¹⁴²⁰ *Ibid.*, at p. 235.

¹⁴²¹ *Ibid.*, at p. 229. This is the case even in Louisiana, the Civil Code of which is based on French and Spanish civil law, since it also provides for contingency fees, jury trials, and discovery. See ZEKOLL, J., "Comparative Civil Procedure" in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1336.

¹⁴²² See Fed. R. Civ. P. 8(a).

states, “fact pleading” is required instead of notice pleading.¹⁴²³ This means that the claim must contain a detailed description of facts, which makes it possible to ascertain the legal grounds for relief. Similarly, with regard to certain issues, the FRCP require specific pleading.¹⁴²⁴

Moreover, in antitrust cases, following *Bell Atlantic Corp. v. Twombly*, the plaintiff must now be able to demonstrate that there is a plausible ground for its claim by providing sufficient factual matter in support of its claim. The aim of this requirement is to avoid that defendants would be forced to an unreasonably high settlement by claimants with unfounded claims taking advantage of wide and expensive discovery.¹⁴²⁵ This requirement has now been extended also to other types of cases.¹⁴²⁶

Essentially the parties may rely on the following types of evidence to prove their case: depositions, written interrogatories, documents, requests for entry onto land for inspection, and requests for admission.¹⁴²⁷ The rules of evidence tend to favor oral evidence over written evidence, since the presentation of opposing views of the evidence is more “immediate” regarding oral evidence and argument than written evidence and argument, thus better achieving the aim of the adversary system.¹⁴²⁸

After the parties have resolved preliminary defenses and pleadings, the next step is to investigate and develop the facts of the case. This is done by way of discovery, which is a pretrial process the aim of which is to prepare the parties on all aspects of the case before the trial by allowing them to familiarize themselves with the evidence and witnesses of the opposing party.¹⁴²⁹ The FRCP provide for a wide range of discovery

¹⁴²³ See BURNHAM, W., *Introduction to the law and legal system of the United States*, Fifth Edition, West, St. Paul, 2011, at p. 230.

¹⁴²⁴ See e.g. FRPC 9(g) which requires the plaintiff to specifically state any item of special damage that it is claiming.

¹⁴²⁵ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), paras. 556-558.

¹⁴²⁶ See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

¹⁴²⁷ Fed. R. Civ. P. 27-36.

¹⁴²⁸ See BURNHAM, W., *Introduction to the law and legal system of the United States*, Fifth Edition, West, St. Paul, 2011, at p. 83.

¹⁴²⁹ *Ibid.*, at p. 235.

devices for private litigants once the action has been brought.¹⁴³⁰ During discovery parties will exchange information relevant to the case by responding to documents requests, interrogatories, and depositions.¹⁴³¹ They must disclose promptly to each other information that they may use to support their case. This includes copies or descriptions of relevant documents in their control, the identities of individuals likely to have discoverable information, and a calculation of damages claimed. The parties have to disclose the information without waiting for a discovery request.¹⁴³² It is possible to obtain discovery regarding any, non-privileged, matter which is relevant to the claim or defense of any party. “*If discovery appears reasonably calculated to lead to the discovery of admissible evidence*”, it may be obtained even if the relevant material is not admissible at the trial.¹⁴³³ On the contrary, this is usually not possible in most EU Member States where only identified, specific documents being admissible as evidence may be requested.¹⁴³⁴

A person may be required to give oral and written answers to relevant questions.¹⁴³⁵ This can also be done in foreign countries by taking deposition by oral examination of persons.¹⁴³⁶ But if those persons are not U.S. nationals or residents, the assistance of the foreign country concerned is necessary if they do not agree to the deposition testimony.¹⁴³⁷

Discovery is particularly important because the adversary system of the United States applies a single, concentrated, continuous trial, requiring the parties to prove and defend

¹⁴³⁰ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 105.

¹⁴³¹ See BRODER, D., *U.S. Antitrust Law and Enforcement, A Practice Introduction*, Oxford University Press, Oxford New York, 2012, at p. 234.

¹⁴³² Fed. R. Civ. P. 26(a)(1).

¹⁴³³ Fed. R. Civ. P. 26(b)(1).

¹⁴³⁴ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 106. This is e.g. the case in Spain, Sweden and Finland. See Sections 3.5-3.7 of the thesis.

¹⁴³⁵ Fed. R. Civ. P. 30-31.

¹⁴³⁶ Fed. R. Civ. P. 28(b).

¹⁴³⁷ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 108.

their case within a limited time frame which restricts the possibilities of rebutting possible surprising evidence presented by the opposing party.¹⁴³⁸

Discovery in Canada is much more limited. Before the certification hearing, plaintiffs would have to rely on evidence e.g. from settling defendants in exchange for discounted settlements, expert economists, discovery documents provided in related proceedings in the United States, former employees of the defendants, and possible related criminal proceedings. However, the information from criminal proceedings does not encompass information obtained through leniency or amnesty applications, and is generally limited to publicly available information.¹⁴³⁹ Once the class has been certified, the parties must generally produce all relevant documents in their possession, power, or control.¹⁴⁴⁰ Oral discoveries are typically limited to one corporate representative of each party,¹⁴⁴¹ and discovery of third parties requires leave of the court.¹⁴⁴² The documents and information obtained through discovery cannot be used for any other purpose, which will limit the possibilities of obtaining confidentiality protective orders. Because of the more limited discovery in Canada, claimants have started to request access to evidence given in discovery in related U.S. cases.¹⁴⁴³ This has been allowed as it has been considered as consistent with facilitating access to justice, judicial efficiency, and behavior modification, which underlie the objectives of class proceedings. In addition, the significant reduction of litigation costs has been taken into account.¹⁴⁴⁴

¹⁴³⁸ See BURNHAM, W., *Introduction to the law and legal system of the United States*, Fifth Edition, West, St. Paul, 2011, at p. 235.

¹⁴³⁹ See WRIGHT, C.M., “Canada” in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 455-456.

¹⁴⁴⁰ Ontario Rules of Civil Procedure, RRO 1990, Reg. 194, R. 30.03. However, it should be noted that in Quebec the parties must only produce those documents which they intend to rely upon or which are specifically requested by the other party during oral discovery. See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 220, Note 83.

¹⁴⁴¹ *Ibid.*, R 31.03.

¹⁴⁴² *Ibid.*, R 31.10.

¹⁴⁴³ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 220.

¹⁴⁴⁴ *Vitapharm v Hoffmann-LaRoche Ltd* [2002] OJ No 298 (SCJ).

As the discovery devices available in civil proceedings are very generous, access to evidence is significantly facilitated for victims of antitrust violations and, as a result, bringing antitrust damages actions is considerably easier especially in the United States than in the EU. Once the class has been certified, the discovery rights are also much more extensive in Canada than in most EU jurisdictions. In addition, the fact that Canadian courts have allowed claimants to request access to evidence in discovery in related cases in the United States facilitates meeting the standard of proof for an antitrust damages claim.

6.2.3. Class Actions

One of the distinctive features of the U.S. legal system is the class action, which allows one party or a group of parties to bring an action as representatives of a larger class of unidentifiable individuals. It is defined as “*any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action*”.¹⁴⁴⁵

The class action facilitates the bringing of damages claims which would otherwise be too small to be enforced individually by allowing the victims to pool their resources, and save the costs and time of the proceedings. Moreover, it has a deterrent effect.¹⁴⁴⁶ It is based on an “opt-out” model, i.e. any individual member of the class which does not opt out from the action will be bound by the judgment and any award resulting from the action will be made to the members of the class as a whole.¹⁴⁴⁷ The whole class must also bear the costs of litigation.¹⁴⁴⁸

¹⁴⁴⁵ 28 USC § 1711.

¹⁴⁴⁶ See BLAIR, R.D. and BOYLSTON HERENDON, J., “Antitrust class actions – problems and prospects: introduction”, *The Antitrust Bulletin*, Vol. 48, Issue 2, Summer 2003, p. 449-450, at p. 449.

¹⁴⁴⁷ See WAELBROECK, D., SLATER, D. and EVEN-SHOSHAN, G., “*Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules*”, August 31st, 2004, at p. 43

¹⁴⁴⁸ See LANG, C., “Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims”, *World Competition*, 24(2), 2001, p. 285-302, at p. 288.

There are three kinds of class actions, but the most interesting one is the so-called “common question” class action, which can be used to seek damages¹⁴⁴⁹ when “*questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [...] a class action is superior to other available methods for the fair and efficient adjudication of the controversy*”.¹⁴⁵⁰ A considerable number of antitrust class actions are filed under Rule 23(b)(3) of the Federal Rules of Civil Procedure.¹⁴⁵¹

Class actions may also be brought under state laws, which are often modeled after the Federal rules.¹⁴⁵² As stated above, state attorneys general can also bring *parens patriae* claims,¹⁴⁵³ but these claims have rather tended to result in coupon settlements,¹⁴⁵⁴ or the awards have been directed to charitable causes instead of directly compensating consumers.¹⁴⁵⁵

Follow-on class actions can also be brought following a civil or criminal action by the government. The advantage is that claimants may use the resulting judgment as *prima facie* evidence of the antitrust violation when they seek damages.¹⁴⁵⁶ A follow-on action can also be brought even if the statutory limitation period has expired, provided that it is brought within one year following the government action.¹⁴⁵⁷ Follow-on class actions used to dominate, but stand-alone class actions increased in the 1980s. Whether class

¹⁴⁴⁹ The other two are “incompatible standards” or “impeding of interests” actions, and class actions for seeking injunctive or declaratory relief. See Fed. R. Civ. P. 23(b)(1) and Fed. R. Civ. P. 23(b)(2) and SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁴⁵⁰ Fed. R. Civ. P. 23(b)(3).

¹⁴⁵¹ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁴⁵² See Consumer Redress Study, at p. 272.

¹⁴⁵³ 15 U.S.C. § 15c(a)(1).

¹⁴⁵⁴ A coupon settlement means a settlement in which the class members receive a coupon for a discount in purchasing another of the defendant’s products while the class counsels are paid fees in cash.

¹⁴⁵⁵ See LANG, C., “Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims”, *World Competition*, 24(2), 2001, p. 285-302, at p. 299.

¹⁴⁵⁶ Sec. 5(a) of the Clayton Act, 15 U.S.C. § 16.

¹⁴⁵⁷ Sec 5(i) of the Clayton Act, 15 U.S.C. § 16. The statutory limitation period for damages actions is usually four years from the cause of action accrued. See Sec. 4B of the Clayton Act, 15 U.S.C. § 15b.

actions are brought on “follow-on” or “stand-alone” basis is likely to depend on the types of government actions brought.¹⁴⁵⁸

A person or several persons can file an antitrust class action as class representative for a defined class. Usually class representatives are self-appointed,¹⁴⁵⁹ but today virtually all antitrust class actions are brought by a lawyer or a law firm under a contingency fee arrangement.¹⁴⁶⁰

Certification of Class Actions

Once a person has sued or has been sued as a class representative, the court must decide whether to certify the action as a class action.¹⁴⁶¹ The object of the certification of the class is to ensure that the class is sufficiently cohesive to justify a class action, and it also determines who will be bound by the final judgment.¹⁴⁶² In order to be certified as a class action, the action must fulfill the four requirements of Fed. R. Civ. P. 23(a). These include 1) numerosity of parties so that joinder of all members is impracticable; 2) the existence of questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class.

The claims and defenses are considered “typical” if the interests of the class representative are sufficiently aligned with those of the class members. However, the plaintiffs can still be at different levels in the distribution chain.¹⁴⁶³ In order to meet the

¹⁴⁵⁸ See LANG, C., “Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims”, *World Competition*, 24(2), 2001, p. 285-302, at p. 300-301.

¹⁴⁵⁹ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 *Federal Rules Decisions* 130, 2003.

¹⁴⁶⁰ See SITTENREICH, M.A. “The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions”, *Fordham L. Rev.*, 78, April, 2010, p. 2701-2750, at p. 2735.

¹⁴⁶¹ Fed. R. Civ. P. 23(c)(1)(a).

¹⁴⁶² See POLVERINO, F., “A Class Action Model for Antitrust Damages Litigation in the European Union”, August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 9-10.

¹⁴⁶³ See *Sumitomo Copper Litigation*, 182 F.R.D. 85, (S.D.N.Y., 1998) and POLVERINO, F., “A Class Action Model for Antitrust Damages Litigation in the European Union”, August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 7.

requirement of adequacy, there can be no significant conflicts of interest between the representative party and the absent class members. Conflicts which are apparent, imminent, and concern an issue at the very heart of the action would therefore exclude a class action for damages. The class counsel must also have the knowledge of the applicable law and the experience required to successfully conduct the class action litigation, as well as sufficient financial means to bring the action.¹⁴⁶⁴ In the past years, the courts have additionally required that the class be clearly ascertainable by using objective criteria.¹⁴⁶⁵ This means that there must be sufficient data about the members of the class so as to identify the class members.

Before the judge can certify the class in class actions for damages, additionally the case must meet the requirement that “*questions of law or fact common to the members of the class predominate over questions affecting only individual members*”.¹⁴⁶⁶ This requirement is usually the key issue on which the litigation in the certification focuses on. In order to satisfy this criterion, litigants must focus most of their efforts on the common issues so that it is possible to conduct a single class trial with class-wide evidence without the necessity of numerous trials on issues and facts which are only relevant to individual class members.¹⁴⁶⁷ The court will therefor assess a) the class members’ interest in individually controlling the prosecution or defense of separate actions; b) the extent and nature of any litigation concerning the controversy already begun by or against class members; c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and d) the likely difficulties in managing a class action.¹⁴⁶⁸

Courts have discretion in considering whether the certification criteria for class actions are met.¹⁴⁶⁹ Nevertheless, there have been divergences in the courts’ decisions on class

¹⁴⁶⁴ Fed. R. Civ. P. 23(g)(1).

¹⁴⁶⁵ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁴⁶⁶ Fed. R. Civ. P. 23(b)(3).

¹⁴⁶⁷ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁴⁶⁸ Fed. R. Civ. P. 23(b)(3).

¹⁴⁶⁹ See POLVERINO, F., “A Class Action Model for Antitrust Damages Litigation in the European Union”, August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 10-11.

certification since some courts have also made considerations on the merits at the class certification stage,¹⁴⁷⁰ whereas others have focused more on whether the claim satisfies the requirements of Rule 23.¹⁴⁷¹

In antitrust cases, courts have generally certified classes more freely because in claims arising from antitrust violations the common questions are likely to predominate over questions affecting only individual members.¹⁴⁷² Most of the issues involved in such claims depend on the defendant's behavior, which is common to all class members,¹⁴⁷³ and which can be proven by class-wide evidence.¹⁴⁷⁴ For instance, the existence of an antitrust violation can be established in the class action procedure. Conversely, for example, causation, injury, and the amount of damages must, at least partly, be assessed individually as the injury suffered by different plaintiffs may vary.¹⁴⁷⁵ But since there are both common issues as well as individualized issues, the case law on class certification in such cases is also divergent.¹⁴⁷⁶ For instance, some courts have given a preferred status to antitrust cases which they generally consider suitable for class certification because of the important role of class actions in private enforcement,¹⁴⁷⁷ while other courts have treated antitrust damages actions just as any other case.¹⁴⁷⁸

Another issue treated divergently concerns the treatment of individualized damages questions. Some courts certify classes even though there are individualized damages,

¹⁴⁷⁰ *Szabo v. Bridgeport Machines*, 249 F.3d 672 (7th Cir. 2001).

¹⁴⁷¹ *Eggleston v. Chicago Journeymen Plumbers' Local No. 130*, 657 F.2d 890, (7th Cir. 1981).

¹⁴⁷² See PAGE, W.H., "Introduction: Reexamining the Standards for Certification of Antitrust Class Actions", *Antitrust*, Vol. 21, Issue 3, Summer 2007, p. 53-54, at p. 53.

¹⁴⁷³ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 292.

¹⁴⁷⁴ See POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 24.

¹⁴⁷⁵ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, p. 294.

¹⁴⁷⁶ See KLONOFF, R.H., "Antitrust Class Actions: Chaos in the Courts", *Stanford Journal of Law, Business and Finance*, Vol. 11:1, Autumn 2005, p. 1-26, at p. 1.

¹⁴⁷⁷ See *Vitamins Antitrust Litigation* 209 F.R.D. 251 (D.D.C. 2002).

¹⁴⁷⁸ See *Windham v. American Brands, Inc.* 539 F.2d 1016 (4th Cir. 1976), and KLONOFF, R.H., "Antitrust Class Actions: Chaos in the Courts", *Stanford Journal of Law, Business and Finance*, Vol. 11:1, Autumn 2005, p. 1-26, at p. 2.

whereas others refuse.¹⁴⁷⁹ It has, for instance, been accepted that as long as the common proof demonstrates some damage to each individual, proof of damages can be shown on a common basis.¹⁴⁸⁰ Especially in cases involving numerous small claimants with low-value claims, individual calculation and distribution of damages could be burdensome and, therefore, the courts have sometimes certified classes in order to determine liability in a common action and ordered damages to be determined later.¹⁴⁸¹

The aggregate proof and assessment of damages is explicitly provided regarding *parens patriae* claims. Moreover, the courts have discretion to decide how the damages awarded shall be distributed.¹⁴⁸² This has also sometimes been accepted in antitrust class actions.¹⁴⁸³

Once the class has been certified, “*the court must give to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort*”.¹⁴⁸⁴ This is crucial as the members of the class must be given an opportunity to opt out from the class, so that they can, if they prefer, bring an individual claim instead. However, in most cases only a small number of the plaintiffs choose to opt out.¹⁴⁸⁵

Another challenge involved in the certification of the class concerns classes including foreign claimants. The Federal Rules on Civil Procedure does not contain any provision in this respect, but the judge must decide whether or not to allow foreign claimants to file a class action. Foreign claimants do in general have standing to bring antitrust damages actions in the United States, but their right is more limited than for U.S.

¹⁴⁷⁹ See KLONOFF, R.H., “Antitrust Class Actions: Chaos in the Courts”, *Stanford Journal of Law, Business and Finance*, Vol. 11:1, Autumn 2005, p. 1-26, at p. 21.

¹⁴⁸⁰ *Bogosian v. Gulf Oil. Corp.*, 561 F. 2d 434.

¹⁴⁸¹ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁴⁸² Sec. 4D of the Clayton Act, 15 U.S.C. § 15d and sec. 4E of the Clayton Act, 15 U.S.C. § 15e.

¹⁴⁸³ See LANG, C., “Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims”, *World Competition*, 24(2), 2001, p. 285-302, at p. 296.

¹⁴⁸⁴ Fed. R. Civ. P. 23(c)(2)(b).

¹⁴⁸⁵ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

claimants. Following the adoption of the Foreign Trade Antitrust Improvements Act (“FTAIA”), which amended the Sherman Act, the latter only applies to conduct involving non-import trade or commerce with foreign nations when such conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade and commerce, and gives rise to a claim under the Sherman Act.¹⁴⁸⁶

The meaning of this provision has been the subject of divergent rulings by U.S. lower courts,¹⁴⁸⁷ but this issue was settled by the U.S. Supreme Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*¹⁴⁸⁸ In this case, five foreign purchasers of vitamins brought a follow-on action for damages alleging that they had suffered harm in the form of paying higher prices for vitamin products in the United States and in some other countries caused by the vitamins cartel operated by *F. Hoffman-LaRoche Ltd.* The Supreme Court held that foreign plaintiffs may only sue in the U.S. courts if their injuries have been directly and proximately caused by the domestic effects of the anti-competitive action. In other words, if the adverse foreign effect of the anti-competitive conduct is independent of any adverse domestic effect, the Sherman Act does not apply to a claim based solely on foreign effect. The Court reasoned that the aim of the FTAIA was not to expand the scope of application of the Sherman Act to foreign commerce by including independently caused foreign injury to its scope of application. It also held that the FTAIA had to be construed in such a way so as not to unreasonably interfere with the sovereign authority of other nations and, therefore, the scope of application of the Sherman Act had to be limited in cases in which there was a risk of interfering with a foreign nation’s ability to independently regulate its own commercial affairs.¹⁴⁸⁹ Following this ruling, it would appear that purchases made outside the United States from a seller outside the U.S. would probably not give rise to a claim under the Sherman Act, unless they can show that the harm caused to them by the price-fixing agreement is dependent on the harm caused by the agreement in the United States.¹⁴⁹⁰ In

¹⁴⁸⁶ Sec. 7 of the Sherman Act, 15 U.S.C. § 6a (Foreign Trade Antitrust Improvements Act of 1982).

¹⁴⁸⁷ See, for example, *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (C.A. 5 2001), and *Kruman v. Christie’s International plc*, 284 F.3d 384.

¹⁴⁸⁸ *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359 (2004).

¹⁴⁸⁹ *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359 (2004).

¹⁴⁹⁰ See RYNGAERT, C., “Foreign-to-Foreign Claims: the US Supreme Court’s Decision (2004) v the English High Court’s Decision (2003) in the Vitamins Case”, *E.C.L.R.*, Volume 25, Issue 10, 2004, p. 611-616, at p. 613.

cases involving global cartel agreements, the domestic harm would not occur without the global cartel, so there are not likely to be many situations in which the harm will be truly independent.¹⁴⁹¹

There are arguments in favor of allowing foreign claimants to bring class actions in the United States as well as arguments against it. Including foreign claimants in the class would increase the deterrent effect of that class action as the class would be larger.¹⁴⁹² Moreover, foreign claimants might not have effective remedies available in other forums, or have access to evidence located in the United States, if they are excluded from the class.¹⁴⁹³

Nevertheless, when deciding on the certification of a class including foreign plaintiffs, the court must also consider the preclusive effect of the class action judgment in order to ensure that some foreign claimants could not later challenge the binding effect of the resulting judgment by bringing an action in a court of their home countries¹⁴⁹⁴ where the preclusive effect of a US class judgment might not be clear. The preclusive effect could, for instance, be challenged because treble damages are contrary to public policy of many countries, and cannot be enforced in these countries. Similarly, the “opt-out” mechanism of the U.S. class action is often considered to violate the rights of absent class members. It can also be challenging to notify foreign class members if all are not identified.¹⁴⁹⁵ This can, in turn, risk the binding effect of the class action, with the result that the class action will not contribute to achieving consistency and finality of the judgment.¹⁴⁹⁶

¹⁴⁹¹ See SPRIGMAN, C., “Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels”, *University of Chicago Law Review*, 72, Winter 2005, p. 265-287, at p. 276.

¹⁴⁹² See BUSCHKIN, I.T., “The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts”, *Cornell Law Review*, 90, September, 2005, p. 1563-1600, at p. 1583.

¹⁴⁹³ *Ibid.*, at p. 1596-1598.

¹⁴⁹⁴ See WALKER, J., “Crossborder class actions: a view from across the border” *Michigan State Law Review*, Fall 2004, p. 755-798, at p. 763.

¹⁴⁹⁵ See BUSCHKIN, I.T., “The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts”, *Cornell Law Review*, 90, September, 2005, p. 1563-1600, at p. 1577-1580. For example, linguistic and cultural barriers render it difficult for judges to identify the best way to notify potential claimants of the class action and their rights. *See op. cit.* at p. 1582.

¹⁴⁹⁶ *Ibid.*, at p. 1577 and 1582.

But if the individual claims are so small that it would not be economically viable to bring those claims individually in another country due to the lack of effective access to justice, there would be little risk of the preclusive effect of the judgment being questioned.¹⁴⁹⁷ In these cases the only reason not to certify a class including foreign claimants would be the possible difficulty in reaching them in time to allow them to opt out from the class. However, since they would in any case lack an effective remedy, arguably, they would not be any worse off even if a class action was brought on their behalf against their will in the United States, as they could only gain something if it were successful, and would not have any obligation to pay any adverse cost in case of a failure of the action.

Some U.S. states, including New York, New Jersey and Connecticut, have attempted to ensure the preclusive effect of class actions by providing that non-residents must opt in to the class in order to be bound by the decision, while other class members must opt out. However, if non-residents constitute more than a small part of the claimants, there is still a risk that the class will be smaller, which reduces the preclusive effect of the resulting judgment or settlement.¹⁴⁹⁸

Another important feature of the U.S. class action is the significant role of the class action lawyer. Today it is no longer the class representative or the class as a whole, but the class action lawyer, who is the actual decision-maker of the class. Since there is a risk that the lawyer's behavior might not always be dictated by the best interests of the class, but by the wish to ensure that he receives some form of payment for his services, it is particularly important who has the power to select and monitor the class counsel. Especially if the fee is not related to the interests of the client and the initial investment into the action, the lawyer might attempt to settle early before the costs of extended discovery become too high. There could hence be a risk that the lawyer accepts a

¹⁴⁹⁷ See WALKER, J., "Crossborder class actions: a view from across the border", *Michigan State Law Review*, Fall 2004, p. 755-798, at p. 771-772.

¹⁴⁹⁸ See WALKER, J., "Crossborder class actions: a view from across the border", *Michigan State Law Review*, Fall 2004, p. 755-798, at p. 767-770.

settlement that is lower than what would be in the interests of his clients.¹⁴⁹⁹ This is avoided today by the requirement that all settlements must be approved by a judge, who has to assess the fairness of the settlement.¹⁵⁰⁰ Moreover, the adequacy of the class counsel to represent the class must also be verified by the court at the certification stage.¹⁵⁰¹

The role of the judge is more accentuated in class action litigation than in traditional two-party proceedings in the adversarial common law system in which the parties are required to provide the court with all the information that is necessary to decide the case. In class actions, the judge must play a more active role, for instance, by asking the parties more questions and appointing his own experts to examine certain issues of the dispute or the proposed settlement and, in general, direct the evidence gathering process. Consequently, the court cannot rely on the parties to present all the facts, but must exercise greater control over the proceedings and play a role similar to the inquisitorial role of judges in most civil law countries.¹⁵⁰²

The judge will also determine the amount of the successful plaintiffs' attorney's fees. Usually there are two ways to calculate the lawyer's fees: common fund cases and fee shifting cases.¹⁵⁰³ In common fund cases the fee constitutes a percentage of the fund created for the benefit of the class. In fee shifting cases, fees are usually multiplied by the number of hours spent on the case, which is known as the lodestar method. The fee may be adjusted in order to reflect the hours reasonably spent on the litigation.¹⁵⁰⁴ This latter method for calculating the fees is generally applied in antitrust actions, since Section 4 of the Clayton Act provides for one-way fee shifting, i.e. the defendant must

¹⁴⁹⁹ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 291.

¹⁵⁰⁰ Sec. 3(e) of the CAFA, 28 USC § 1712.

¹⁵⁰¹ Fed. R. Civ. P. 23(g)(1).

¹⁵⁰² See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 294.

¹⁵⁰³ *Ibid.*, at p. 289.

¹⁵⁰⁴ See SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 *Federal Rules Decisions* 130, 2003.

pay reasonable attorney's fees of the successful claimant, and must pay its own legal costs in any case.¹⁵⁰⁵

As stated above, many certified class actions are settled. The parties agree on the class attorney's fee, which requires the approval of the court.¹⁵⁰⁶ This requirement is particularly important when the settlement comprises large amounts to be paid to the plaintiffs because class attorneys tend to settle more often in these cases. Moreover, the control exercised by the court is necessary due to the difficulties for plaintiffs in monitoring the conduct of the class attorney once the class has been certified.¹⁵⁰⁷

If a class action results in a judgment awarding damages, the court may establish a procedure for paying the awards to class members. Class members would be requested to return a claim form to prove the harm that they have suffered by the defendant's conduct. However, when class actions are settled, the settlement agreements usually contain procedures also for paying the class members. The court may approve the proposed settlement if it finds it fair, reasonable and adequate.¹⁵⁰⁸ It may refuse to approve a settlement unless it is possible for individual class members to opt out from the settlement that did not opt out at an earlier stage of the litigation.¹⁵⁰⁹ Further, any class member has the right to object to the settlement proposal.¹⁵¹⁰

Sometimes class members do not receive a damages award in cash, but are instead given a coupon for a discount if they purchase another of the defendant's products. Such coupon settlements have often been rejected by courts as unfair if the class counsels are paid large fees in cash.¹⁵¹¹ As stated, following the adoption of the Class Action

¹⁵⁰⁵ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 288-289. The lodestar method is admissible also in class actions. See Sec. 3(b)(2) of the CAFA, 28 USC § 1712.

¹⁵⁰⁶ See SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130, 2003.

¹⁵⁰⁷ See POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 15.

¹⁵⁰⁸ Fed. R. Civ. P. 23(e)(2).

¹⁵⁰⁹ Fed. R. Civ. P. 23(e)(4).

¹⁵¹⁰ Fed. R. Civ. P. 23(e)(5).

¹⁵¹¹ See SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 Federal Rules Decisions 130, 2003.

Fairness Act of 2005, the court may approve such settlements only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members.¹⁵¹² Furthermore, the portion of any attorney's fee to class counsel must also be proportionate to the value of the recovery of the class members.¹⁵¹³ The court may also appoint an expert qualified to provide information on the actual value to the class of the coupons that are redeemed.¹⁵¹⁴ These measures aim to ensure that the class counsel does not agree to settle a case with the incentive of a large fee, while class members would receive little compensation.

In Canada, the criteria for class certification will depend on the province. Most provinces apply similar criteria as Ontario, but Quebec applies different rules.¹⁵¹⁵ Typically, the claimant must show that 1) there is a viable cause of action for the claim; 2) a class of two or more persons can be identified who are willing to be represented by a representative plaintiff; 3) the claims of the class members raise common issue; 4) a class action would be the preferable procedure for resolution of the action; and 5) there is an appropriate plaintiff representative.¹⁵¹⁶ It is somewhat easier to meet the Canadian criteria for certification than the U.S. criteria because it is sufficient that a class action is the "preferable option", i.e. it is not necessary to show that the common issues predominate over the individual issues. However, since there is no broad discovery available before the certification of the class, it could sometimes be challenging for claimants to meet the certification criteria.¹⁵¹⁷

Regarding the cause of action, only if it is "plain and obvious" that the claim will not succeed will certification be denied on this ground. As a result, it is difficult for the

¹⁵¹² Sec. 3(e) of the CAFA, 28 USC § 1712.

¹⁵¹³ Sec. 3(a) of the CAFA, 28 USC § 1712.

¹⁵¹⁴ Sec. 3(d) of the CAFA, 28 USC § 1712.

¹⁵¹⁵ The criteria for certification in Quebec are significantly lower. The claimant has to demonstrate that 1) the claims of the members raise identical, similar or related questions of law or fact; 2) the facts alleged seem to justify the conclusions sought; 3) the composition of the group makes the application of representative actions or joint actions difficult or impracticable; and that the representative will represent the members adequately. See *Quebec Code of Civil Procedure*, art 1003.

¹⁵¹⁶ The Ontario Class Proceedings Act, 1992 SO 1992, c 6, section 5.

¹⁵¹⁷ See FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 216.

defendant to impede certification arguing that there is no cause of action.¹⁵¹⁸ Contrary to some U.S. courts,¹⁵¹⁹ the Canadian courts do not generally make determinations on the merits during the certification hearing. The class must be capable of clear definition in order to be considered as identifiable. But this does not require that every class member must be named, or known at the beginning of the proceeding. Moreover, class members must share the same interest in the resolution of the common issues. These issues are common issues of facts or common issues of law that arise from common facts. In other words, the “common issues” do not have to be identical issues of fact or identical issues of law, as long as they are common. But the determination of the common issues must avoid the duplication of fact-finding and/or legal analysis, and the common issues must be necessary to resolve each class member’s claim; and a “substantial ingredient” of each member’s claim.¹⁵²⁰

Whether the class action is the preferable procedure will depend on whether it is the preferable procedure for determining the entire action, which is assessed by taking into account judicial economy, access to justice, and behavior modification. The class proceedings must also be fair, efficient, and manageable in order to satisfy this condition.¹⁵²¹

In order to qualify as representative plaintiff, a plaintiff must fairly and adequately represent the interest of the class; provide a plan for the proceedings that sets out a workable method of advancing the action on behalf of the class and notifying the class of the proceeding, and its interest must not conflict with the interest of other class members on the common issues.¹⁵²²

Ontario, Alberta, Manitoba, Saskatchewan, and Nova Scotia have opt-out class actions, whereas British Columbia and Newfoundland and Labrador have hybrid “opt-out” and

¹⁵¹⁸ *Ibid.*, at p. 217.

¹⁵¹⁹ See e.g. *Szabo v. Bridgeport Machines*, 249 F.3d 672 (7th Cir. 2001).

¹⁵²⁰ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 217.

¹⁵²¹ *Idem.*

¹⁵²² The Ontario Class Proceedings Act, 1992 SO 1992, c 6, section 5(1)(e).

“opt-in” regimes: opt-outs apply to residents, while non-residents are subject to the “opt-in” principle.¹⁵²³ This approach is therefore similar to the one adopted by some U.S. states.¹⁵²⁴ In order for a Canadian court to be able to certify a class including non-residents (either from other provinces or countries), there must be a real and substantial connection between the damages claims of non-residents and the forum is required.¹⁵²⁵

Settlement agreements also require certification so that all class members are bound. In order to be certified, the settlement has to be fair, reasonable and in the best interest of the class.¹⁵²⁶ These criteria are therefore very similar to those ones applicable to class action settlements in the United States.

6.2.4. Incentives and Costs

United States is a particularly attractive forum for bringing antitrust damages claims in that its costs rules are beneficial to the claimant and if the claim is successful, the claimant will be awarded treble damages.¹⁵²⁷ Sec. 4 of the Clayton Act provides for one-way fee-shifting; only the defendant must pay the costs and reasonable attorney’s fees to the successful claimant, and must always bear its own legal costs. In general, the claimant will therefore not be obliged to pay for the defendant’s litigation costs even if its claim fails, although there are some exceptions to this principle.¹⁵²⁸ The reasoning behind the one-way fee shifting rule is to compensate claimants for undertaking risky, expensive litigation.¹⁵²⁹ Moreover, in order to reduce the claimant’s own litigation costs in case its claim is unsuccessful, it can conclude a so-called contingency fee

¹⁵²³ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 222.

¹⁵²⁴ See WALKER, J., “Crossborder class actions: a view from across the border”, *Michigan State Law Review*, Fall 2004, p. 755-798, at p. 767-770.

¹⁵²⁵ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 225-226.

¹⁵²⁶ *Ibid.*, at p. 227-228.

¹⁵²⁷ Sec. 4 of the Clayton Act, 15 U.S.C. § 26.

¹⁵²⁸ See e.g. Rule 11 of the Federal Rules of Civil Procedure 28 U.S.C. § 11(c).

¹⁵²⁹ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 251.

arrangement with its lawyer, which means that the lawyer will only receive a fee if he wins the case.¹⁵³⁰

Treble Damages

Treble damages increase private enforcement, as they provide incentives for private litigants to bring damages actions, and ensure that victims of antitrust violations also obtain full compensation when the jury determinations are imprecise,¹⁵³¹ or when some damages, for example the pre-judgment interests, may not be recoverable. Furthermore, they serve as a deterrent against antitrust violations, and compensate for the fact that not all anti-competitive conduct is detected and pursued. Similarly, as antitrust violations reduce consumer welfare in general, which is not normally reflected in the damages, treble damages make the infringer pay damages that correspond more fully to the harm caused by the violation to society. They also remove the incentives of infringers to engage in anti-competitive conduct since they force disgorgement of unlawfully obtained gains from anti-competitive conduct.¹⁵³²

On the other hand, treble damages are an incentive for defendants to settle with the result that few cases reach trial.¹⁵³³ This tendency is reinforced by the fact that defendants are jointly and severally liable for antitrust violations, but defendants may seek reduction of plaintiffs' claims only of the amount that defendants, who have settled with the plaintiffs, have paid. The reduction may be sought only after total damages have been determined and trebled. In addition, defendants may not seek contribution from other defendants who have not settled. Consequently, one single defendant could

¹⁵³⁰ In fact, contingency fees are common in private antitrust litigation, including class actions. See WILDFANG and SLAUGHTER, "Funding Litigation" in FOER and CUNEO (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2010, p. 220-239, at p. 234.

¹⁵³¹ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 297.

¹⁵³² See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, at p. 246.

¹⁵³³ See YSEWYN, J., "Private enforcement of competition law in the EU: trials and tribulations", *International Law Practicum*, 19-Spring, 2006, p. 14-19, at p. 15.

be responsible for most of the damage caused by the antitrust violation, which incentivize defendants to settle early in order to avoid excessive liability.¹⁵³⁴

In order to avoid the unfair outcome that less culpable defendants pay an excessive share of total damages while more culpable defendants escape all or a significant part of liability, the Antitrust Modernization Commission has recommended that non-settling defendants be allowed to reduce plaintiffs' remaining claims against them by the ratable share of liability of the settling defendants, or the amount of the settlement, whichever is greater. In addition, non-settling defendants should be permitted to seek contribution from other non-settling defendants to the extent that the damages paid by the defendants seeking contribution are disproportionate.¹⁵³⁵ In this manner, all defendants would be liable for the violation and would face an appropriate level of deterrence. The recovery of the plaintiffs would also only be reduced, if it decided to settle claims instead of pursuing them.¹⁵³⁶

In general, it is not so much the availability of multiple damages, which has been criticized, but rather the choice of the treble multiplier. It has been suggested that the multiplier should reflect the likelihood of detecting antitrust violations and that it should only be available where it is easy to hide the violation, such as in horizontal price-fixing.¹⁵³⁷ Because of treble damages, there is also a risk that companies abstain from conduct that is in the gray-zone between legal and illegal with the result that innovation is stifled.¹⁵³⁸ Therefore, it has been proposed that treble damages should only be

¹⁵³⁴ See ANTITRUST MODERNIZATION COMMISSION, *"Report and Recommendations"*, April 2007, at p. 252.

¹⁵³⁵ *Ibid.*, at p. 252-253. The Antitrust Modernization Commission has recommended that the liability of each defendant should be equal to its market share or, if the market share would not be an appropriate basis for allocating liability, relative gain from the antitrust violation. *See op. cit.* at p. 254.

¹⁵³⁶ *Ibid.*, at p. 252-253.

¹⁵³⁷ See BUXBAUM, H.L., *"Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law"*, in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 52.

¹⁵³⁸ See LANG, C., *"Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims"*, *World Competition*, 24(2), 2001, p. 285-302, at p. 297.

awarded in cases of clear-cut *per se* anti-competitive conduct. Alternatively, it could be left to the judge's discretion to award treble damages for flagrant antitrust violations.¹⁵³⁹

But these suggestions do not take into consideration that the aim of treble damages is not only to deter but also to compensate for the complexity and duration of antitrust cases, and the difficulty of proving antitrust infringements,¹⁵⁴⁰ which is not characteristic only of price-fixing agreements.¹⁵⁴¹ In fact, the incentive of treble damages would be needed the most in meritorious antitrust class actions requiring significant investment of time and resources, but in which the outcome is uncertain and which would otherwise not be brought.¹⁵⁴²

In Canada, Section 36 of the Competition Act does not provide for treble damages, but merely for full compensation of the damage suffered. In addition, the injured party may recover the full cost of “*any investigation in connection with the matter and of proceedings*” under Section 36. Nevertheless, the recovery also includes pre-judgment interest,¹⁵⁴³ so it is possible that the total recovery will still be more significant than treble damages without prejudgment interest would be. But in any case, the claimant will only obtain full compensation, and there are no punitive damages.¹⁵⁴⁴

In class actions, the possibility of assessing liability and damages on an aggregate basis for the whole class will depend on the province in question. In British Columbia, the B.C. Court of Appeal held in *Pro-Sys Consultants Ltd v Infineon Technologies AG* that

¹⁵³⁹ See BUXBAUM, H.L., “Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law”, in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 53-54.

¹⁵⁴⁰ See RICHARDS, J.D., “What makes an antitrust class action remedy successful?: a tale of two settlements”, *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 630.

¹⁵⁴¹ See e.g. *Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 (D.Md. 2001).

¹⁵⁴² See RICHARDS, J.D., “What makes an antitrust class action remedy successful?: a tale of two settlements”, *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 633.

¹⁵⁴³ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 212, Note 38.

¹⁵⁴⁴ However, it should be noted that tort claims based on common law may also allow punitive damages which are not available under Section 36 of the Canadian Competition Act. See HOOD, J., KENT, D. and LOW, M., “Canada: Private Antitrust Litigation”, *The Antitrust Review of the Americas* 2011.

aggregate damages could be assessed in the case because some of the defendants had admitted in proceedings in the United States that they had engaged in a wrongful conduct, and had made illegal gains from that conduct. The claimants were therefore able to use statistical evidence to demonstrate that the illegal benefit was attributable to the class and its quantum.¹⁵⁴⁵ Conversely, the Ontario Court of Appeal has required that liability must first be proven for the whole class before determining the amount of damages.¹⁵⁴⁶ It is not possible to use aggregate damages to prove that there has been class-wide injury.¹⁵⁴⁷

The issue whether infringers have the right to seek contribution from co-infringers in an antitrust damages action is still to be settled in Canada.¹⁵⁴⁸

Contingency Fees

Treble damages alone are not incentive enough for potential claimants to file antitrust class actions, especially if the claims of the individual plaintiffs are small. This is so because the prospect of the individual claimant to only recover its own damages, which is a modest amount even if trebled, is a very small incentive to initiate burdensome proceedings. Instead, the compensation of the class action lawyer is crucial, and one-way fee shifting provides an important incentive to private antitrust litigation.¹⁵⁴⁹

Under U.S. law, it is possible to make a contingency fee arrangement, i.e. the lawyer will only be paid if the action is successful. It is consequently in the lawyer's interest to achieve damages that are as large as possible. In order to maximize the gains, the lawyers will try to reduce the costs. Therefore, they are often active in fields where it is easier to detect possibly rewarding cases or engage in follow-on actions. Similarly, the lawyers tend to reduce the risk by making use of diversification in that they hold a

¹⁵⁴⁵ *Pro-Sys Consultants Ltd v Infineon Technologies AG*, 2009 BCCA 503, paragraphs 31-33, and 70.

¹⁵⁴⁶ (2003) 63 O.R. (3d) 22 (CA) [Chadha].

¹⁵⁴⁷ *Irving Paper v Atofina Chemicals Inc* 2010 ONSC 2705 [Irving Paper v Atofina Chemical].

¹⁵⁴⁸ See FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 213.

¹⁵⁴⁹ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Devise for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 288-289 and 298.

portfolio of cases.¹⁵⁵⁰ Several U.S. law firms have consequently specialized in antitrust class actions, and promptly bring follow-on action or stand-alone actions when there is public information about anti-competitive conduct.¹⁵⁵¹

The rationale for awarding attorneys' fees to successful plaintiffs is to help to guarantee that meritorious damages claims will be efficiently brought.¹⁵⁵² The incentive of making large gains is essential for the functioning of the class action mechanism in particular when the individual claims are small, since victims of antitrust violations do not have the particular knowledge of bringing damages actions, and would not be able to take advantage of economies of scale and diversification as the specialized lawyer can.¹⁵⁵³ The recoverability of attorneys' fees also provides additional incentives for private litigants to pursue anti-competitive conduct.¹⁵⁵⁴ Contingency fees also facilitate the alignment of lawyers' and clients' interests because both will receive a part of the damages awarded if the claim is successful. Moreover, since lawyers will only obtain a fee if the claim succeeds, they have an incentive to only accept cases which are likely to succeed.¹⁵⁵⁵

Since the purpose of attorneys' fees is to provide an incentive to detect and prosecute anti-competitive conduct, the Antitrust Modernization Commission has recommended that fees should be appropriately reduced in follow-on actions. It argues that in cases in which much of the evidence used in the litigation has been developed as part of government investigation, it is less necessary to grant attorneys' fees to the plaintiff due to the relative lack of risk and burden for the plaintiff to bring the action. The fees

¹⁵⁵⁰ *Ibid.*, at p. 289-290.

¹⁵⁵¹ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 37.

¹⁵⁵² See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, p. 250.

¹⁵⁵³ See LANG, C., "Class Actions and the US Antitrust Laws: Prerequisites and Interdependencies of the Implementation of a Procedural Device for the Aggregation of Low-Value Claims", *World Competition*, 24(2), 2001, p. 285-302, at p. 290.

¹⁵⁵⁴ See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, at p. 250.

¹⁵⁵⁵ See SHAJNFELD, A., "A critical survey of the law, ethics, and economics of attorney contingent fee arrangements" *N.Y.L. Sch. L. Rev.*, 54, 2009/2010, p. 773, at p. 776.

should therefore reflect this.¹⁵⁵⁶ This would reduce the negative effect of class counsels sometimes receiving excessively high awards at the cost of the defendant.

However, it should be borne in mind that there are also other limitations to the use of contingency fees. A claimant is only likely to conclude a contingency fee agreement if its claim is significant enough to give an attorney the incentive to take the risk of possibly not recovering anything if the action should fail.¹⁵⁵⁷

In Canada, the provinces apply different cost rules what again makes its legal system interesting to analyze from an EU perspective, since the costs rules in the EU are mostly decided under national legislation. In British Columbia, costs will not be awarded against either the claimant or defendant for any aspect, whereas in Alberta the court has discretion to award costs. Ontario and Quebec apply the “loser pays” principle, but the court has discretion to reduce, or deny costs. Moreover, in Ontario, only the representative is responsible for adverse costs, but can obtain funding from the Ontario Class Proceedings Fund or indemnification from class counsel’s firm.¹⁵⁵⁸

Generous contingency fees are also available in Canada. They usually range from 20% to 30%, and in addition disbursements and applicable taxes will be compensated.¹⁵⁵⁹ The rationale behind such fees is to ensure access to justice.¹⁵⁶⁰ In fact, almost all class actions in Canada are brought under contingency fee arrangements. But as in the United States, it is also possible to adjust the fees if they are not reasonable, or to use other methods for calculating the attorneys’ fees. The class counsel’s fees must also be approved by a court, which can award a lower amount if the fees would be excessive. It

¹⁵⁵⁶ See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, at p. 251.

¹⁵⁵⁷ See ZEKOLL, J., “*Comparative Civil Procedure*” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1356.

¹⁵⁵⁸ See FACEY, B.A. and ROSNER, D., “*Collective Redress for Cartel Damages in Canada*” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 222.

¹⁵⁵⁹ See WRIGHT, C.M., “*Canada*” in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 460.

¹⁵⁶⁰ See FACEY, B.A. and ROSNER, D., “*Collective Redress for Cartel Damages in Canada*” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 223.

has also become increasingly common that contingency fee arrangements include an obligation for the class counsel to compensate the representative plaintiff for any adverse cost award. Moreover, in Ontario, claimants can also apply for financing to a public fund in order to bring a class action. In case the action succeeds, they must repay the funding received and also pay a percentage of the settlement and/or award obtained.¹⁵⁶¹

Finally, in spite of the prohibition of champerty, a funding arrangement by a litigation-finance company has been approved in a class action, and was not considered to constitute evidence of the funder initiating the action. An Irish company engaged exclusively in providing litigation funding financed the action in question in exchange for 7% of any recovery in the litigation. Although such arrangements may raise questions regarding confidentiality, in this case the court found that it was acceptable that the plaintiff disclosed some degree of information to the funder of the class action.¹⁵⁶²

6.2.5. Significance of Other Features of the Civil Procedure for Private Enforcement

The U.S. civil procedure contains features that do not exist in civil law systems, or at least not to the same extent as in the U.S. legal system. Permissive discovery rules, contingency fee arrangements, the award of costs and attorneys' fees to the successful plaintiff, without the obligation for the unsuccessful plaintiff to pay these costs, and class actions, to name a few, are common features of the general system of civil procedure in the United States, whereas treble damages are specific to the antitrust law.¹⁵⁶³ In addition, the fundamental role played by the class counsel in class actions must also be borne in mind.

¹⁵⁶¹ See WRIGHT, C.M., "Canada" in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 460-461.

¹⁵⁶² [2011] OJ No 1239 (SJD) [Dugal].

¹⁵⁶³ See GINSBURG, D.G., "Comparing antitrust enforcement in the United States and Europe", *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 436-437. Treble damages were in fact already included in the Sherman Act of 1890. See YSEWYN, J., "Private enforcement of competition law in the EU: trials and tribulations", *International Law Practicum*, 19-Spring, 2006, p. 14-19, at p. 15.

In the United States, both plaintiffs and defendants have a right to demand trial by jury in a treble-damage action. However, a trial by jury is not always demanded, since antitrust cases tend to be complex, and a jury might be unsuitable to resolve it. But courts disagree on whether a significant complexity of the case is a ground for denying a jury trial. Because of the possibility of jurors not being capable of handling antitrust cases well, parties with a weak case might wish to request a jury trial hoping to obtain a favorable outcome in the case.¹⁵⁶⁴ The availability of jury trials thus increases the uncertainty of the outcome in antitrust cases. However, the existence of jury trials could also play in favor of the defendant precisely due to the uncertainty of the action. Moreover, in class actions the class has to pass the certification stage so it is not unlikely that a very weak case would be argued before a jury. Similarly, following *Twombly*, a plausible ground for the claim is required in order to bring the action, so claimants must provide enough factual matter supporting their claim,¹⁵⁶⁵ which makes it easier for courts to reject unfounded cases.

The features of the U.S. civil procedure, which foster private actions, have resulted in antitrust follow-on actions being almost automatic when the government has successfully pursued an anti-competitive conduct.¹⁵⁶⁶ Private enforcement thus plays a very significant role in the United States, and reflects the goal of the antitrust policy chosen: *“the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.”*¹⁵⁶⁷

Moreover, some features characteristic of antitrust litigation may contribute to the high level of private antitrust enforcement in the United States. For instance, the classification of a certain type of conduct as *“per se”* unlawful significantly increases the level of private enforcement, since claimants are not required to prove an actual

¹⁵⁶⁴ See AREEDA, P., KAPLOW, L. and EDLIN, A., *Antitrust Analysis*, Aspen Publishers, New York, 2004, at p. 74.

¹⁵⁶⁵ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵⁶⁶ See JOELSON, M.R., *An International Antitrust Primer. A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, third edition, Kluwer Law International, Alphen aan den Rijn, 2006, at p. 37.

¹⁵⁶⁷ *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), § 139.

anti-competitive effect of the conduct in question.¹⁵⁶⁸ Furthermore, the provision that a final judgment or decree finding that a defendant has violated antitrust laws constitutes *prima facie* evidence against the defendant in subsequent private actions for damages,¹⁵⁶⁹ has prompted defendants to settle their cases with public authorities, because this way they avoid a judgment or a decree that would make it easier for potential claimants to bring damages actions.¹⁵⁷⁰

Although Canada shares some of the features of the U.S. antitrust litigation procedure, antitrust enforcement in Canada was initially based on public enforcement, and private enforcement did not increase significantly until the Supreme Court confirmed the constitutionality of antitrust damages actions in 1989.¹⁵⁷¹

6.2.6. Concluding Evaluation of the U.S. and Canadian Private Enforcement Models

The existence of extensive discovery rights, treble damages, contingency fees, the one-way fee shifting rule, and class actions based on the “opt-out” model, as well as the role played by the courts, class counsels and juries in antitrust damages actions in the United States makes the antitrust enforcement model very different from civil law jurisdictions. Canada, in which the civil and common law legal systems coexist, have in the past decades adopted some of these U.S. features, such as opt-out class actions and contingency fees. However, it does not provide for treble damages, although punitive damages are possible under common law torts, and does not generally apply jury-trials. Discovery rights are also less extensive. In addition, there is no federal equivalent to the provision in the CAFA of 2005 which would allow the removal of multi-jurisdictional cases to federal courts.

¹⁵⁶⁸ See GINSBURG, D.G., “Comparing antitrust enforcement in the United States and Europe”, *Journal of Competition Law and Economics*, 1(3), 2005, p. 427-439, at p. 437.

¹⁵⁶⁹ 15 U.S.C. §§ 12-27.

¹⁵⁷⁰ See YSEWYN, J., “Private enforcement of competition law in the EU: trials and tribulations”, *International Law Practicum*, 19-Spring, 2006, p. 14-19, at p. 16.

¹⁵⁷¹ See *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors of Canada*] and FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 205.

In spite of these differences, it appears that private enforcement has increased in Canada following the adoption of class actions, in particular in cartel cases. In this context, it should be noted that virtually all class actions are brought under contingency fee arrangements, which indicates the importance of the availability of contingency fees in order to fund class actions.

Discovery

The advantages of the generous discovery rules in the United States is that claimants can obtain access to evidence about facts and issues which would otherwise be impossible to learn about, in particular with regard to secret cartels. Also proof of other types of infringements or the scope of the harm suffered could be challenging to adduce without discovery rights. Moreover, discovery is also beneficial to the defendant since it will learn about all the factual and legal issues relevant to understand the claim, which facilitate the preparation for trial.

Nevertheless, discovery can be very time-consuming and expensive. If the costs of the action increase, bringing the claim will only be attractive if contingency fees are available to the claimant. For costly cases, the willingness of a lawyer to accept such cases would depend on the probability of the claim being successful as he would have to bear the litigation costs of his client in case the claim fails. The size of the antitrust damages claim will therefore also be relevant, as small claims would not give a sufficient incentive to undertake the risks of litigation even if the damages will be trebled if the claim succeeds. It would seem that a balance would have to be struck between providing effective access to evidence through discovery, while at the same time keeping its costs in check.

Canada has limited the discovery rights until the class has been certified. But claimants have sometimes alleged that this could make it difficult to meet the certification criteria. After the certification of the class, in most provinces, parties must produce all relevant documents in their possession, power, or control.¹⁵⁷² Since claimants in Canada have started to request discovery documents provided in related proceedings in the United

¹⁵⁷² See e.g. Ontario Rules of Civil Procedure, RRO 1990, Reg. 194, R. 30.03.

States,¹⁵⁷³ it appears that the current Canadian discovery rules are not necessarily sufficient to allow them to bring antitrust damages class actions successfully. On the other hand, the fact that the Canadian courts allow this shows that the legal system works in those cases where there are indeed discovery documents available. In other cases, the discovery rules would sometimes fall short of ensuring access to justice.

Class Actions

The U.S. class action has many advantages when private antitrust litigants seek damages for the harm that they have suffered from an antitrust violation. The same advantages apply to the Canadian class action which can be brought on an “opt-out” basis in some provinces (or as a hybrid class action involving both class members to which the “opt-in” principle applies and those to whom the “opt-out” principle is applicable), whereas in the rest of the provinces the “opt-in” class actions would be subject to the same limitations as certain “opt-in” collective actions existing in the EU.

First and foremost, the class action makes it possible to enforce claims that would be too small to be viably enforced individually, thus contributing to a larger number of victims receiving adequate compensation and an increasing over-all deterrence. The class action could be particularly helpful in informing other victims who might be unaware that they have suffered harm from an antitrust violation. This would in particular be the case of secret price-fixing agreements. As the class action in the United States is based on the “opt-out” model, all potential class members must be informed of the action as soon as the court has certified the class and they will, consequently, be able to seek redress. Consequently, a class action is often the only means to both inform victims of their rights, and provide a viable option for seeking damages for the loss that they have suffered.¹⁵⁷⁴

Even large purchasers who have suffered a significant loss might be dissuaded from bringing a stand-alone action due to its complexity, high costs, and burdensome

¹⁵⁷³ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 220.

¹⁵⁷⁴ See HAUSFELD, M., OLSON, S. and GASSMANN, S., “Antitrust Class Actions: Continued Vitality”, *The Antitrust Review of the Americas*, 2008, p. 71-73, at p. 71-72.

procedure. For instance, in the *Microsoft* case, the plaintiffs' attorneys spent over five years on the litigation, and more than \$10 million only on the cost of joint discovery and expert work.¹⁵⁷⁵ Class actions are therefore often the only viable form of bringing an action. The ability of numerous small claimants to bring a class action will also reinforce the effect of the substantive antitrust rules, since potential infringers must when they are planning their market strategies take into account that they could be held liable also when the victims are claimants with limited economic resources to bring an individual action.¹⁵⁷⁶

The class representative also benefits from the class action, since the larger the class is, the greater his bargaining power towards the defendant or defendants will be, which could result in an advantageous settlement. The possibility of a successful outcome by judgment also increases because the other class members could have useful information and evidence in their possession that could facilitate proving the antitrust violation. The class action therefore makes it possible to take advantage of economies of scale, thus reducing the costs of the action, which usually constitutes an obstacle to private enforcement,¹⁵⁷⁷ and improving the possibilities of succeeding.

A private class action is also more efficient as public enforcement when it comes to compensation of the actual damage that the antitrust violation has caused to the economy.¹⁵⁷⁸ Public enforcement merely puts an end to the infringement, and contributes through deterrence to the reduction of future antitrust violations, but it does not compensate victims of antitrust violations for the economic loss that they have already suffered. Class actions are therefore necessary to ensure that these victims can obtain adequate compensation.

The class action saves resources in that it makes it possible to avoid deciding on the same issue several times in separate cases which also benefits the defendant. Furthermore, it ensures that similar cases are resolved consistently, since the outcome of

¹⁵⁷⁵ *Ibid.*, at p. 71.

¹⁵⁷⁶ See POLVERINO, F., "A Class Action Model for Antitrust Damages Litigation in the European Union", August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 33.

¹⁵⁷⁷ *Ibid.*, at p. 35.

¹⁵⁷⁸ *Ibid.*, at p. 34.

the litigation is binding on all class members,¹⁵⁷⁹ unless some of the class members have decided to opt out. However, the number of class members who choose to opt out tends to be low.¹⁵⁸⁰ Furthermore, even if some of the class members which have opted out decided later to bring an action against the defendant, it would still have to face fewer trials than if all or most of potential class members decided to sue it individually.

The class action also makes the task of the court easier, although it can be challenging to manage a large class action case. But being obligated to decide on the same infringement multiple times would be even more burdensome, wasting both the time of courts and economic resources. In addition, the risk of divergent outcomes of actions brought in different courts also entails a risk of inconsistency, and reduced legal certainty.

As regards evidence, the class actions serve to reduce costs and the administrative burden in follow-on actions since the public enforcer can hand the evidence to a single class representative instead of to several plaintiffs. The task of monitoring the use of the transmitted evidence that might contain confidential information is also facilitated, since the evidence will only be used in one trial. It has been suggested that class actions could also make it possible for the plaintiff to hire better legal and specialist advice thanks to the requirement of adequacy of representation for class certification. The judge would hence make sure that the counsel is an experienced lawyer, and the plaintiff has proper economic advice on what evidence needs to be provided, and how it should be interpreted.¹⁵⁸¹

¹⁵⁷⁹ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003. However, the binding effect of the judgment or settlement would require that potential class members have been duly notified about the action in order to exercise their right to opt-out. As has been shown in Section 6.2.3, this could sometimes be problematic especially in cases involving foreign class members. Moreover, in such cases, there could also be a risk of the foreign class members later attempting to challenge the preclusive effect of the judgment or settlement by bringing a damages action before the courts of their home countries, before which a U.S. or Canadian decision might not be enforceable.

¹⁵⁸⁰ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 Federal Rules Decisions 130, 2003.

¹⁵⁸¹ See POLVERINO, F., “A Class Action Model for Antitrust Damages Litigation in the European Union”, August 28th, 2006, available at <http://ssrn.com/abstract=927001>, at p. 28-29.

Nevertheless, the class action is not unproblematic, and does not solve all issues related to private enforcement. For example, there is a risk that competitors bring frivolous class actions attempting to force the defendant to settle, as the defendant faces the prospect of paying treble damages if it is found guilty, and it may thus prefer to settle instead, sometimes even though its conduct is not anti-competitive.¹⁵⁸² But the risk of frivolous lawsuits is reduced by the requirement that the plaintiff must demonstrate that it has suffered an antitrust injury resulting from the defendant's conduct.¹⁵⁸³ The judge may therefore refuse to certify the class if this prerequisite is not satisfied.

The perception in Europe that Americans are excessively litigious is also not necessarily completely correct at least as regards private antitrust enforcement, since antitrust class actions represent only a moderate number of federal class actions.¹⁵⁸⁴ Moreover, this so-called "litigation culture" already existed before private antitrust litigation significantly increased.¹⁵⁸⁵ The possibility of bringing unfounded claims have further been reduced by the requirement that the claimant must show that there is a plausible ground for its claim by providing sufficient facts supporting its claim.¹⁵⁸⁶ The judge also plays a fundamental role in class actions in certifying the class. He or she should only accept claims satisfying the certification requirements, and must ensure that the misuse of the class action procedure is prevented. The certification of the class by the judge is crucial since the possible award of damages is often decided by the jury. In addition, the fact that settlements and attorneys' fees must be approved by the court¹⁵⁸⁷ also contributes to limit unfair outcomes of class actions. However, it is worrying that the case law on certification in class action is very divergent in the United States in the United

¹⁵⁸² *Ibid.*, at p. 34.

¹⁵⁸³ *See Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), at § 489.

¹⁵⁸⁴ Even when antitrust class actions were at their peak, they represented less than 8% of the total number of class actions. *See* BUXBAUM, H.L., "Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law", in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 57-58.

¹⁵⁸⁵ *Ibid.*, at p. 57-58.

¹⁵⁸⁶ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵⁸⁷ *See* SHERMAN, E.F., "American class actions: significant features and developing alternatives in foreign legal systems", 215 *Federal Rules Decisions* 130, 2003.

States.¹⁵⁸⁸ It would be desirable that a level-playing field would be established, as the courts currently interpret the certification requirements so differently.

It must also be noted that abuse normally occurs in other types of class action cases, for examples securities actions and business tort cases. Unfounded antitrust class actions are essentially barred because the outcome is too uncertain, and they are too expensive. Furthermore, defendants are usually not willing to settle early because they can make a motion to dismiss the case, oppose class certification, and make a motion for a summary judgment. It is very difficult that an unfounded antitrust case will pass all these stages. Thanks to the Class Action Fairness Act of 2005, it has also become considerably more difficult to bring class actions in state courts in which abuses have usually occurred.¹⁵⁸⁹ Finally, under Rule 11 of the Federal Rules of Civil Procedure sanctions can be imposed on parties and their counsel bringing frivolous cases.¹⁵⁹⁰

The CAFA of 2005 has also reduced other potential drawbacks of class actions. For instance, the court may refuse to approve a settlement unless individual class members, who did not opt out at an earlier stage of the litigation, are given the opportunity to opt out from the settlement.¹⁵⁹¹ Although this reduces the preclusive effect of the judgment to class members who have not opted out, it is still necessary in order to prevent class counsels from accepting settlements that are not necessarily favorable to the class member. The possibility of removing cases that involve parties from several states to federal courts¹⁵⁹² will also increase the consistency of judgments, and benefit both plaintiffs and defendants.

Nevertheless, if the interests of different class members are not sufficiently similar, the class action may result in a worse outcome for the class members and the defendant than if the cases had been decided individually. In order to avoid conflicts of interest

¹⁵⁸⁸ See KLONOFF, R.H., “Antitrust Class Actions: Chaos in the Courts”, *Stanford Journal of Law, Business and Finance*, Vol. 11:1, Autumn 2005, p. 1-26, at p. 2.

¹⁵⁸⁹ See SCHNELL, G., “Class Action Madness in Europe – a Call for a More Balanced Debate”, *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 618.

¹⁵⁹⁰ 28 U.S.C. §11(c).

¹⁵⁹¹ Fed. R. Civ. P. 23(e)(2).

¹⁵⁹² See ANTITRUST MODERNIZATION COMMISSION, “*Report and Recommendations*”, April 2007, at p. 269.

regarding the distribution of a settlement or award between the classes in cases involving several groups of class members, it could also be necessary that the different classes are represented by different attorneys. The drawback of this is, however, that it might become difficult to pursue such a class action effectively. One way of avoiding this which has been increasingly used is to appoint attorneys who are not associated to the class counsels to represent different groups. In case of a conflict of interest, these attorneys resolve the issues through negotiation amongst themselves.¹⁵⁹³

Another drawback of class actions is that they sometimes fail to compensate indirect purchasers efficiently, for instance, because they receive vouchers or products instead of monetary compensation. Indirect purchasers might not wish to collect them,¹⁵⁹⁴ and such arrangements might also intensify the market effects of the antitrust violation concerned if they can only be used for purchases from the infringers.¹⁵⁹⁵ Moreover, the identification of indirect purchasers and quantification of their claims could be difficult, especially in cases involving small claims. For larger claims defendants' business records and computer databases as well as electronic technologies, e.g. the Internet, facilitate this task.¹⁵⁹⁶

These difficulties explain why the U.S. Supreme Court decided in *Illinois Brick*¹⁵⁹⁷ to deny standing to indirect purchasers since they could not be considered as efficient enforcers. But it does not seem justified to exclude consumers, who have often suffered the largest loss as they cannot pass on the overcharge, whereas direct purchasers who might not have been injured at all can claim compensation. In addition, even if the individual claims of indirect purchasers are sometimes smaller than the amount of the compensation, such claims could be used to fund a *cy pres* award in order to use it for the benefit of uncompensated class members to the extent possible.¹⁵⁹⁸

¹⁵⁹³ See RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 646.

¹⁵⁹⁴ See ANTITRUST MODERNIZATION COMMISSION, "Report and Recommendations", April 2007, at p. 273.

¹⁵⁹⁵ See RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 655.

¹⁵⁹⁶ *Ibid.*, at p. 638-640.

¹⁵⁹⁷ *Illinois Brick v. Illinois*, 431 U.S. 720 (1977).

¹⁵⁹⁸ See RICHARDS, J.D., "What makes an antitrust class action remedy successful?: a tale of two settlements", *Tulane Law Review*, 80, December, 2005, p. 621-658, at p. 644.

Taking into account that private antitrust enforcement represents over 90% of the enforcement of antitrust laws in the US, it is clear that the current system works. However, the class action may not be the only reason for this, although private enforcement increased significantly a few years after the Federal Rules of Civil Procedure were modified in 1966 to incorporate an effective class action mechanism.¹⁵⁹⁹ It is clear that also permissive discovery rules, contingency fee arrangements, and no obligation for the unsuccessful plaintiff to pay the costs and attorneys' fees to the defendant, and treble damages facilitate and provide huge incentives for bringing damages actions. Especially when the individual claims are small, the class action device will make it possible to enforce claims, which would otherwise not be enforced. In this context the potential large gains in the form of contingency fees available to the class counsel also serve as an important incentive, which is necessary for the functioning of the class action mechanism, since without them few, individually small claims would probably not be brought.

The potential risks and drawbacks involved in the U.S. class action can also be significantly reduced by courts scrutinizing cases at the class certification stage, and only giving their approval to settlements that are fair, reasonable, and adequate. Furthermore, limiting jury-trials to straightforward cases would also prevent plaintiffs from abusing the class action mechanism through unmeritorious claims.

To conclude, the advantages of the class action based on the "opt-out" model appear to outweigh the drawbacks, particularly if adequate safeguards such as rigorous scrutiny by courts are put in place.

Incentives and Costs

The U.S. and Canadian experiences show that the class action mechanism alone is not sufficient to increase private enforcement. This is due to the high costs of litigation, which are accentuated in the United States, where the extensive discovery rights raise the cost of antitrust damages action. Class action litigation tends to be especially

¹⁵⁹⁹ See BUXBAUM, H.L., "Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law", in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 45.

complex and expensive when there are different subgroups of class members. In addition, establishing the infringement and harm is also likely to require economic evidence and the use of expert economists. This may explain why virtually all class actions both in the United States and Canada are brought under a contingency fee arrangement. In Canada, antitrust damages actions only become more common once class action legislation had been adopted¹⁶⁰⁰ and contingency fees were permitted. However, the use of litigation-finance companies to fund class action also seems to be increasing.¹⁶⁰¹ Moreover, in Ontario there is also a public fund to which claimants can apply for funding in exchange of repaying the funding received and a percentage of the settlement or award obtained.¹⁶⁰²

The costs of the claim must also clearly outweigh the possible damages awarded in order to incentivize litigation. In the United States, treble damages partly achieve this objective, but since pre-judgment interest is not awarded, antitrust violations which have caused harm during a long period without being uncovered may not necessarily result in more than single damages. In Canada, pre-judgment interest is available, which helps the claimant to achieve full compensation.¹⁶⁰³ On the other hand, punitive damages will only be available for common law tort claims.¹⁶⁰⁴ The often smaller damages awarded in Canada could explain why damages claims are not yet as common as in the United States.

The recoverability of attorneys' fees provides an additional incentive to bring antitrust damages claims especially in the United States, where the one-way fee shifting rule

¹⁶⁰⁰ See FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 232.

¹⁶⁰¹ See e.g. [2011] OJ No 1239 (SJD) [*Dugal*].

¹⁶⁰² See WRIGHT, C.M., "Canada" in in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 447-461, at p. 460-461.

¹⁶⁰³ See FACEY, B.A. and ROSNER, D., "Collective Redress for Cartel Damages in Canada" in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 212, note 38.

¹⁶⁰⁴ See HOOD, J., KENT, D. and LOW, M., "Canada: Private Antitrust Litigation", *The Antitrust Review of the Americas* 2011.

applies. In Canada, the recoverability of such fees will depend on the province.¹⁶⁰⁵ The one-way fee shifting rule only existing in the United States is another feature which could explain the predominance of private enforcement in the United States.

Regardless of the model of private enforcement chosen in the EU, the issues discussed in Section 6.2 must be taken into consideration. Furthermore, a political will among the Member States to adopt a collective action mechanism is an indispensable prerequisite. But this is a question that will be examined more in detail in Section 7.4.6.

6.3. Relevance of the U.S. and Canadian Experiences for Private Enforcement in the EU

The U.S. private enforcement model is the most advanced one of the existing legal systems, and builds on experience from over a century. It therefore serves as a useful reference point also in analyzing how to enhance private enforcement in the EU. In addition, the Canadian private enforcement model is particularly interesting for two reasons. Firstly, because it is a “more modest” version of the U.S. system, and could thus offer an alternative, if it is difficult to find acceptance in the EU for the procedural features of the U.S. enforcement model. Secondly, because the Canadian Competition Act applies in all Canadian provinces, although each of them apply their own procedural rules to enforce it, which reminds of the situation in the EU, where the substantive competition rules are enforced by national procedural rules. The coexistence of civil law and common law jurisdictions increases the relevance of the Canadian experience for the EU.

However, the particular legal and cultural differences should be taken into account in analyzing why the rules work in a specific way as these features might limit the possibility of introducing similar procedural devices in the EU. As a result, the constitutional element of private EU antitrust enforcement has to be borne in mind: Articles 101 and 102 TFEU have direct effect, and can therefore be enforced by individuals before the national courts since they confer rights upon individuals.¹⁶⁰⁶ Individuals must thus be able to enforce the Union right to damages in order to ensure

¹⁶⁰⁵ See Section 6.2.4 of this thesis.

¹⁶⁰⁶ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 11-12.

the effectiveness of the EU competition rules. Public and private enforcement consequently complement each other in the EU, and any modifications to the procedural framework must respect this. But this does not mean that it is impossible to seek inspiration from foreign (i.e. in this case U.S. and Canadian) procedural law, but this indeed happens, although modifications are made to ensure the compatibility with the existing national procedural framework.¹⁶⁰⁷

This section will first outline the main problems with regard to antitrust damages actions in the EU, and will then suggest how the U.S. and Canadian experiences could be built on in order to establish issues which need to be modified so as to enhance private enforcement in the EU, and especially access to justice for consumers.

In the light of the analysis conducted in Chapter 3, it becomes clear that private enforcement is currently under-developed and under-used in the EU. In general, damages actions are mainly focused to a number of Member States, in particular to Germany, the United Kingdom and the Netherlands. Furthermore, consumer claims are rare.¹⁶⁰⁸ The main reasons for the relative lack of private enforcement are high legal costs, and the uncertain outcome of the action. Furthermore, the burden of proof is high, and the access to evidence is limited, which renders it difficult for claimants to prove the infringement and the causal relationship between it and their injury. In addition, quantifying the exact amount of the injury suffered is a complex exercise, especially in cases involving various categories of purchasers. Therefore, in particular consumers with small claims have few possibilities of bringing an action for damages.

Moreover, the single-party model of adjudication is ill suited for deciding claims of many individuals that arise from the same conduct of a defendant. First of all, it is a waste of judicial resources to try the same issues over and over. Second, when the possible gains are smaller than the cost of bringing an individual action, the lack of a group litigation device may deprive the potential claimant of legal redress.¹⁶⁰⁹

¹⁶⁰⁷ See ZEKOLL, J., “*Comparative Civil Procedure*” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1357.

¹⁶⁰⁸ See Impact Assessment Report on Damages Actions, at p. 19.

¹⁶⁰⁹ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 *Federal Rules Decisions* 130, 2003.

The possibility of joining the claims of several parties in the same proceedings, which exists in all EU Member States,¹⁶¹⁰ does not seem to be an effective alternative to collective actions because all individuals must already have initiated proceedings against the infringer, and the court must treat all the plaintiffs' claims separately and make awards individually, although it may make a single judgment. Therefore, the only advantage of a joinder of claims would be a reduction of the costs for hearing the evidence in a joint hearing for all claims.¹⁶¹¹

Moreover, today damages actions are usually brought as follow-on actions in the EU (the exception being e.g. Germany), although stand-alone actions could be a faster corrective mechanism since the action can be brought before the official investigation has been concluded.¹⁶¹² But this is naturally only possible if there is an effective mechanism in place for bringing such actions in an economically viable manner. Furthermore, the public enforcement of competition rules in the EU focuses on hardcore cartels, and thus incentives would be needed for consumers and other victims to enforce other violations in order to increase deterrence, and achieve better general compliance with the competition rules.

In addition, anti-competitive conduct is nowadays increasingly of international or even global character, signifying that victims could come from a number of different countries. Since not all EU Member States provide for some form of collective redress for consumers, consumers from different Member States might not be able to join a collective redress action in the Member State of the infringer, or be represented, for instance, by a public consumer association due to the fact that they come from different Member States. This, in turn, results in inefficiency and inequity.¹⁶¹³

¹⁶¹⁰ See DEGOS, L. and MORSON, G.V., "Class system. The Reforms of Class Action Laws in Europe Are as Varied as the Nations Themselves", *Los Angeles Lawyer*, 29-NOV, 2006, p. 32-38, p. 34.

¹⁶¹¹ See STADLER, A., "Collective Action as an Efficient Means for the Enforcement of European Competition Law" in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 195-213, at p. 202.

¹⁶¹² See OFFICE OF FAIR TRADING, "Private actions in competition law: effective redress for consumers and business", Discussion Paper, OFT916, April 2007, at p. 14.

¹⁶¹³ See KUNEVA, M., "Healthy markets need effective redress", speech at the Conference on Collective redress, Lisbon, November 10th, 2007, at p. 5.

Consequently, there would be a need for a mechanism that could eliminate, or at least reduce, the current obstacles to private enforcement. The above-mentioned reasons are but a few for examining the efficiency of the collective action in antitrust cases and its significance for private enforcement in the light of the U.S. and Canadian class action models. Moreover, thanks to the adoption of collective redress mechanisms in a number of Member States in the past decade, the time seems ripe to examine how to design a more effective, EU-wide collective redress mechanism.

The possible advantages of introducing a collective action in the EU would depend on the action introduced. However, there are general benefits that are common to collective actions, regardless of the type of action. Collective actions contribute to efficiency in the administration of justice.¹⁶¹⁴ Although, in general, the possibility of a fair outcome in an individual proceeding might be greater with regard to the individual plaintiff – at least in cases which the courts would be able to effectively decide individually – a collective action increases the social fairness, i.e. it enables individuals to seek damages in situations in which they would not be able to enforce their rights individually.¹⁶¹⁵ As a consequence, the access to the justice system would be better.¹⁶¹⁶ In fact, already in 2006, 74% of the consumers in 25 EU Member States stated that they would be more likely to enforce their rights in court if they could bring an action together with other consumers.¹⁶¹⁷

Collective actions for damages also have a market regulating function in complimenting the gaps in the control of markets carried out by public enforcers,¹⁶¹⁸ decrease the

¹⁶¹⁴ See HODGES, C., “Europeanization of civil justice: trends and issues”, *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 118-119.

¹⁶¹⁵ See MICKLITZ, H.-W., “*Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen*” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, “*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*”, Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

¹⁶¹⁶ See LUTFALLA, E. and MAGNIER, V., “French Legal Reform: What is at Stake if Class Actions are Introduced in France?”, *Def. Couns. J.*, 73, July 2006, p. 301-311, at p. 306.

¹⁶¹⁷ Special Eurobarometer, *Consumer protection in the internal market*, published in September 2006, at p. 100, available at http://ec.europa.eu/public_opinion/archives/ebs/ebs252_en.pdf.

¹⁶¹⁸ See MICKLITZ, H.-W., “*Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen*” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, “*Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection*

asymmetry between large companies and consumers with regard to the possibility of taking action,¹⁶¹⁹ and address the problem of potential litigation costs outweighing the individual loss of claimants in cases in which the total loss of consumers and undertakings may be very significant.¹⁶²⁰ Apart from these and some other benefits analyzed Section 6.2., there are additional advantages of collective actions that depend on the type of action.

The U.S. class action (and the opt-out class actions available in some Canadian provinces) offers more additional advantages than the existing representative and opt-in collective actions in the EU. No active steps are required by class members to benefit from the class action,¹⁶²¹ which reduces the risk of the number of plaintiffs being too small for the action to pay off due to potential claimants being too passive to take the required measures to join the action. The rights of individuals are also still safeguarded to a certain extent under the Class Action Fairness Act of 2005, which provides that they are given the possibility to opt out from the class action when they are informed of its existence.¹⁶²² They may also decide to opt out even later in the proceedings when a settlement is proposed.¹⁶²³ The obligation to opt out also serves to inform the defendant of the extent of the preclusive effect of the judgment or settlement.

The greatest advantage of the class action is noticeable in cases involving small individual claims, as it is also possible to bring an action for the benefit of unidentified plaintiffs. This is likely to be the most efficient way to deter anti-competitive conduct, since the defendant will face a sufficiently large number of plaintiffs, the claims of which will constitute an important financial deterrent to breaching competition laws.

Instruments of Actions for Injunction and Group Damages Actions”, Conference on 24.2.2006 in Vienna, p. 92-103, at p. 93.

¹⁶¹⁹ See CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 6.

¹⁶²⁰ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 13.

¹⁶²¹ See MULHERON, R., “Some differences with Group Litigation Orders – and why a class action is superior”, *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 48.

¹⁶²² Fed. R. Civ. P. 23(c)(2)(b)(v).

¹⁶²³ Fed. R. Civ. P. 23(e)(5).

The global *Vitamins Cartel* serves to show the efficiency of class actions over other redress mechanisms in recovering losses of a price-fixing agreement. In the United States, thousands of victims could recover approximately \$2.4 billion in total, and the settlement of over €107 million was largest to that date in Canada. In Australia, the class recovered approximately €23.3 million. On the contrary, in the EU, fewer than ten victims recovered a total of less than €7.6 million.¹⁶²⁴

Possible drawbacks to the opt-out class action can also be significantly reduced in the United States and Canada since the courts must examine the adequacy of representation at the class certification stage, and approve a proposed settlement. This makes it possible to ensure that class counsels are not taking advantage of the potentially large benefits involved in antitrust class actions without ensuring an outcome that is also beneficial to the class members. Thanks to the certification criteria, it is also difficult to bring unfounded actions as proof of a plausible cause of action is required.

Admittedly, numerous claims could, for instance, make the quantification of damages more complicated¹⁶²⁵ and longer.¹⁶²⁶ But arguably, a certain level of “complication” could be accepted in exchange for improved access to justice. Moreover, it would be necessary to ascertain that group members are informed throughout the proceedings about the initiation and development of different phases of the litigation. According to European legal understanding, it would fall to the judge to ensure that this information is sufficient. In general, the judge must play an active role in managing the case during the whole litigation. Similarly, the group counsel must also play a managing role, organize the litigation, keep the group members together, stay in contact with the judge etc.¹⁶²⁷ In addition, a EU specific drawback in multi-state claims would be the need to

¹⁶²⁴ See HAUSFELD, M., OLSON, S. and GASSMANN, S., “Antitrust Class Actions: Continued Vitality”, *The Antitrust Review of the Americas*, 2008, p. 71-74, at p. 72.

¹⁶²⁵ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 22.

¹⁶²⁶ See The Consumer Redress Study, at p. 266.

¹⁶²⁷ See MICKLITZ, H.-W., “*Gruppenklagen auf Schadensersatz – offene Fragen und mögliche Lösungen*” in BUNDESMINISTERIUM FÜR SOZIALE SICHERHEIT GENERATIONEN UND KONSUMENTENSCHUTZ, *Band I: Effektiver Rechtsschutz – Die Verbraucherrechtlichen Instrumente der Unterlassungsklage und der Gruppenklage. Effective Legal Redress – The Consumer Protection Instruments of Actions for Injunction and Group Damages Actions*, Conference on 24.2.2006 in Vienna, p. 92-103, at p. 95-96.

provide translations of the notification of the action and the relevant trial material, which would result in additional costs and would delay the proceedings.¹⁶²⁸

Furthermore, in Europe it is often feared that U.S.-style collective actions would result in excessive litigation burdening courts, but in the light of experiences, for example, from Canada and Australia, there is no evidence of that.¹⁶²⁹ Also, there is no evidence of the class action resulting in abuse in antitrust cases.¹⁶³⁰

Although collective actions could serve to foster private enforcement in the EU and, in particular, enable consumers with small claims to obtain compensation for loss caused by antitrust violations, they may not be sufficient to improve private enforcement. Other obstacles to private antitrust enforcement that currently exist also require a solution if private enforcement is to increase. These obstacles include limited access to evidence, the high burden of proof for establishing an infringement of competition rules, and the causal relationship between the infringement and the damage to the claimant, small incentives to bring actions due to high litigation costs and the financial risk involved in bringing an action, and low expected potential gains, short limitation periods etc.

Access to evidence is the key to proving the existence of an antitrust violation and the scope of the harm. In the United States, the generous discovery rights facilitate this often costly and burdensome task. In Canada, such rights are considerably more limited, which has led claimant to request access to discovery document obtained in related U.S. actions.¹⁶³¹ How extensive discovery should be will depend on the degree of invasiveness that can be accepted, i.e. could discovery be requested against the other party or also against third parties, and what information could the party request? The limits to such rights should also be considered: to what extent could confidential

¹⁶²⁸ See MILUTINOVIC, V., “Private Enforcement. Upcoming Issues” in AMATO, G. and EHLERMANN, C-D, *EC Competition Law*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 753.

¹⁶²⁹ See The Consumer Redress Study, at p. 267.

¹⁶³⁰ See AMERICAN ANTITRUST INSTITUTE, “The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition Policy to the 44th President of the United States”.

¹⁶³¹ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 220.

information and trade secrets be compromised? Finally, a balance must be found between ensuring justice and avoiding wasting resources.¹⁶³²

Currently, the possible gains of a successful damages action are not sufficient in the EU to incentivize claimants to bring actions. The introduction of an opt-out collective action would as such also not significantly improve this, although it would reduce the costs of bringing the action. If the individual claims are small, even though the aggregate damage might be considerable, the prospect of only receiving the amount which actually corresponds to the loss is not likely to be sufficient for the claimant to decide that initiating an action would pay off. Some kind of punitive damages for the most flagrant antitrust violations, i.e. hard-core cartels, could be considered in order to provide additional incentives.

More urgently, the cost rules should be re-examined in order to find a balance between potential damages awards and the litigation costs. In the EU, the “loser pays” rule prevails and, therefore, there is always a financial risk in bringing an action since the unsuccessful plaintiff must pay the other party’s legal costs. In order to enhance private enforcement, it should be examined whether the “loser pays” rule could be modified to some extent to reduce the financial risk of bringing claims. A cap could be placed on the costs that claimants would be obliged to pay in case the claim is unsuccessful. This could be justified in complex cases when the outcome is uncertain, since otherwise certain harmful conduct, such as abuse of dominance, might not be pursued. Nevertheless, safeguards should be put in place to ensure that plaintiffs bringing unfounded actions would still be required to compensate the legal costs of the defendant. Under Rule 11 of the Federal Rules of Civil Procedure, sanctions may be imposed on parties bringing frivolous actions.

Another way to incentivize damages actions would be to allow some form of contingency fee arrangements, since the lawyer could then act as a “driving force” in bringing the action when individual claimants do not have the expertise and experience needed to act as group representatives. Due to the costly nature of class actions, in the

¹⁶³² See ZEKOLL, J., “Comparative Civil Procedure” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1354-1355.

United States and Canada, contingency fees (and sometimes third-party funding) appear to be the only effective way of funding class actions. Contingency fees would also encourage lawyers to achieve the best possible recovery for their clients, since their fees would depend on the success of the action. The risk of an increase in unjustified and uncontrolled litigation¹⁶³³ could be decreased by establishing criteria that each action must satisfy before it can be brought, and by giving courts the necessary means to scrutinize the merits of group actions. This is also the case in the United States and Canada where class actions must meet the certification criteria, and judgments and settlements as well as attorneys' fees must be approved by a court. Thus, it is likely that contingency fees would increase access to justice, but they must be regulated and proportionate to the sums and risks involved.

Although contingency fees have generally been prohibited in many civil law systems in the EU,¹⁶³⁴ there is a tendency to permit more flexible ways to reward lawyers. For example, Sweden has introduced a modified contingency fee in that it is possible to pay an increase in the normal remuneration in successful cases.¹⁶³⁵ Moreover, they are permitted e.g. in Spain and Finland, and in certain cases in Germany.¹⁶³⁶

Another relevant issue is difficulties related to indirect purchaser actions. The ECJ has in *Courage* clarified that standing to bring antitrust damages actions extends to any individual that has suffered harm as a result of an infringement of the EU competition rules. Therefore, contrary to the United States, in the EU it is impossible to exclude the right to sue of indirect purchasers on efficiency grounds, if they can prove that they have suffered harm from an antitrust violation.¹⁶³⁷ Since indirect purchasers have standing to bring antitrust damages actions, issues such as the passing-on problem, and calculation of damages are important to resolve.

¹⁶³³ See HODGES, C., "Europeanization of civil justice: trends and issues", *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 104.

¹⁶³⁴ See TARUFFO, M., "Some Remarks on Group Litigation in Comparative Perspective", *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 415.

¹⁶³⁵ See Section 38 of the Group Proceedings Act 2002 (2002:599).

¹⁶³⁶ See Sections 3.3, 3.5, and 3.7 of this thesis.

¹⁶³⁷ See Judgment in *Courage*, EU:C:2001:465, paragraph 24.

It would appear that the passing-on defense would in general be permitted in the EU, since most Member States provide that only the actual damages shall be compensated, and prohibit unjust enrichment. A system must, consequently, be established which makes it possible to calculate the amount that has been passed on from one chain to another in the distribution chain. A possible solution would be to split the establishment of an infringement and causation from the calculation and allocation of damages. Courts could then resolve the question of existence of an antitrust violation fairly quickly, and impose remedies on the defendant in order to put an end to that violation. After that, the calculation of damages would be decided in separate proceedings.¹⁶³⁸ It has been suggested that, for instance, a more specialized body with the required expertise in pass-on calculations could conduct the calculation of damages.¹⁶³⁹ Arguably, the *cy prè*s distribution should also be considered in cases which result in some unclaimed damages so as to ensure that infringers cannot keep their illegal gains, and the injured parties would obtain some compensation, at least indirectly.

Based on the U.S. and Canadian experiences of class actions, it should be examined what modifications would be required in order for it to serve as a model to create a collective action mechanism that is adapted to the European reality. In the field of antitrust enforcement, the advantages of the class actions seem to outweigh their drawbacks. As seen, private antitrust enforcement represents over 90% of the total enforcement of antitrust laws in the United States,¹⁶⁴⁰ and some of it can be contributed to the existence of class actions, in that private enforcement increased significantly a few years after a more effective class action mechanism was adopted in 1966.¹⁶⁴¹ However, the number of antitrust class actions of the total number of class actions

¹⁶³⁸ See MILUTINOVIC, V., “Private Enforcement. Upcoming Issues” in AMATO, G. and EHLERMANN, C-D, *EC Competition Law*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 746.

¹⁶³⁹ See RÜGGERBERG, J. and SCHINKEL, M.P., “Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement”, *World Competition*, 39(3), 2006, p. 395-420, at p. 407.

¹⁶⁴⁰ See LANDE, R.H., “Benefits of private enforcement: empirical background” in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

¹⁶⁴¹ See BUXBAUM, H.L., “Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law”, in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 45.

brought is modest,¹⁶⁴² which would suggest that the class action device is not often being abused in antitrust cases. Moreover, as stated, there is also no evidence of such abuse.¹⁶⁴³

The class action mechanism is necessary in order to make vigorous private enforcement possible in the United States in that it enables private individuals to act as private attorneys general in cases where public enforcers are not willing pursue for several reasons. First, financial resources of public enforcement bodies are limited. Therefore, public enforcers tend to only pursue cases that are most likely to be successful, and thus avoid complex cases. Public enforcement is also dictated by politics, thus making private enforcement an important counterbalance when public enforcement is too lax. Without the class action device, private antitrust enforcement would often be perceived as too risky and expensive, and lacking incentives for individual consumers.¹⁶⁴⁴

Class actions thus also serve to bring stand-alone actions such as the *Visa Check v. MasterMoney* case. The class action, brought on behalf of five million merchants, resulted in \$3.4 billion in damages as well as tens of billions of dollars in reduced pricing.¹⁶⁴⁵ In addition, the U.S. Government could later bring its own action on a related issue against Visa and MasterCard by securing the evidence collected in the private action.¹⁶⁴⁶

Next, the possibility of introducing a more efficient collective action, and the harmonization and/or approximation of other procedural rules supporting such actions in the EU will be examined in order to determine the optimal design of private enforcement.

¹⁶⁴² *Ibid.*, at p. 58.

¹⁶⁴³ See AMERICAN ANTITRUST INSTITUTE, “*The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition policy to the 44th President of the United States*”.

¹⁶⁴⁴ See SCHNELL, G., “Class Action Madness in Europe – a Call for a More Balanced Debate”, *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 617.

¹⁶⁴⁵ *Visa Check v. MasterMoney* Antitrust Litig., 297 F.Supp.2d 503, (E.D.N.Y. 2003).

¹⁶⁴⁶ See SCHNELL, G., “Class Action Madness in Europe – a Call for a More Balanced Debate”, *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 619.

7. THE CASE FOR A MORE COMPREHENSIVE HARMONIZATION: A PROPOSAL FOR ENHANCING PRIVATE ENFORCEMENT OF THE EU ANTITRUST RULES

7.1. Justification for a More Comprehensive Harmonization/Approximation

Although the European Parliament has adopted the Directive on Antitrust Damages Actions and it only requires the formal approval of the Council, the issue of a harmonization of national procedural rules governing antitrust damages actions is somewhat controversial. Generally, the European Union establishes the substantive rules of EU law, whereas Member States establish the procedural rules necessary for the enforcement of Union rights. This principle is known as the principle of procedural autonomy.¹⁶⁴⁷ Moreover, national civil procedure rules tend to apply across a number of different fields of civil law, i.e. the approach is horizontal. Traditionally there has therefore been some opposition from the Member States (and the European Parliament) to establishing specific procedural for antitrust damages claims. This is likely to explain the limited scope of the new Directive.

However, in light of the finding in this thesis and in the doctrine, there is still, despite an increase in the past decade in some Member States, a certain level of under-enforcement of the Union right to damages, most notably by consumers. As demonstrated in Chapter Four, the Directive will arguably do little to improve the situation especially of consumers. Therefore, not only will injured parties not be able to obtain compensation, but the effective enforcement of the EU antitrust rules will also suffer. As stated, thanks to the direct effect of Articles 101 and 102 TFEU, individuals are the principal guardians of EU law. Private EU antitrust enforcement thus reflects the constitutional right of individuals enforcing the rights conferred upon them by EU law.¹⁶⁴⁸ Moreover, national procedural rules which render the enforcement of the Union right to damages difficult or, sometimes virtually impossible, also breach the principle of effectiveness, the ultimate limit to the procedural autonomy.

¹⁶⁴⁷ See JACOBS, F.G., “Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective” in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001, Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford – Portland Oregon, 2003, p. 187-232, 214-215.

¹⁶⁴⁸ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 11-12.

Public and private enforcement of the EU competition rules are also complementary: both ultimately serve the public interest of effective competition since courts cannot ignore the public policy character of competition rules. Private enforcement also ensures that antitrust enforcement is not purely interventionist.¹⁶⁴⁹ In addition, even if the main function of private enforcement is to compensate the harm suffered as a result from antitrust violations, it also has a deterrent function in that the obligation to pay damages increases the possible adverse consequences of competition law infringements. Sometimes civil damages may even be much higher than administrative sanctions as was the case in the *Vitamins Cartel* thanks to treble damages. There are thus a number of reasons which justify the enhancement of antitrust damages claims.

Nevertheless, another question is how private enforcement should be enhanced and, more specifically, how particular procedural rules governing antitrust damages actions would be justified instead of general procedural rules on damages in the field of tort law.¹⁶⁵⁰ The EU legislator has justified the need for sector-specific procedural rules by the negative effect of divergent national liability regimes for antitrust violations on competition and the functioning of the internal market.¹⁶⁵¹

There are also other justifications. Antitrust violations diminish competition in the market and give rise to economic harm to market participants. Generally, they result in increased prices and/or loss of business opportunities for the competitors. In addition, there are other more indirect negative effects, such as deadweight losses, reduced innovation and loss of quality, which are more difficult to assess. Especially when direct victims of antitrust violations pass on the harm to indirect purchasers, the quantification of damages is challenging. Consequently, due to the spread and diffuse nature of the antitrust damage it is difficult to identify the victims who are entitled to damages.¹⁶⁵²

¹⁶⁴⁹ *Ibid.*, at p. 10-13.

¹⁶⁵⁰ See PAULIS, E., “Policy Issues in the Private Enforcement of EC Competition Law” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 7-16, at p. 10.

¹⁶⁵¹ Recital 8 of the Directive on Antitrust Damages Actions.

¹⁶⁵² See MARCOS, F. and SÁNCHEZ GRAELLS, A., “Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?”, *European Review of Private Law*, Volume 16, No. 3, 2008, p. 469-488, at p. 474-475.

This is particularly the case in infringements involving umbrella-pricing, where an undertaking not party to the cartel sets higher prices having regard to the practices of the cartel than it would have under normal conditions of competition on the market. Provided that an injured party can prove the causal relationship between the loss that it has suffered and the cartel, it has a right to claim compensation for the loss suffered from the cartel members even if it did not have contractual links with them.¹⁶⁵³ Antitrust cases are hence generally of complex economic nature but also, for instance, tax fraud cases can be equally complex and require knowledge of economics.¹⁶⁵⁴ This complexity alone could therefore not justify a sector-specific harmonization.

Furthermore, it would, in general, be preferable not to adopt different procedural rules for different sectors, if this is possible to avoid. Such rules may be foreign to the legal systems in some Member States, which could render their application difficult for courts unfamiliar with these rules.¹⁶⁵⁵ To the extent possible, any additional specific procedural rules for antitrust cases should therefore only be adopted if they prove absolutely necessary. Commentators have also emphasized the need for such rules to be linked to general civil and procedural law of the Member States in order to avoid contradictory valuations.¹⁶⁵⁶

However, to the extent divergent national rules on evidence, the burden of proof, collective actions, costs, etc. remain after the implementation of the Directive on Antitrust Damages Actions, they constitute barriers to victims of infringements of the EU antitrust rules to bring antitrust damages actions. Since it is difficult for the Union Courts to completely eliminate these differences by case law by setting aside national

¹⁶⁵³ Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317, paragraphs 33 and 37.

¹⁶⁵⁴ See LESKINEN, C., “The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions”, *Working Paper IE Law School*, WPLSO8-01, 15.1.2008, available at <http://papers.ssrn.com/abstract=1138797>, at p. 15.

¹⁶⁵⁵ See Joint Working Party of the Bars and Law Societies of the United Kingdom (“JWP”), Response to the Commissions Green Paper “Damages actions for breach of the EC antitrust rules”, May 2006, at p. 2.

¹⁶⁵⁶ See e.g. Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green Paper of the EU Commission “Damages actions for breach of the EC antitrust rules”, at p. 2, and PAULIS, E., “Policy Issues in the Private Enforcement of EC Competition Law” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 7-16, at p.10.

rules that impede the effective enforcement of Articles 101 and 102 TFEU,¹⁶⁵⁷ some form of further harmonizing measures are indispensable in order to guarantee effective private enforcement and uniform application of the antitrust rules despite the adoption of the new Directive.

Moreover, the adoption of the Directive on Antitrust Damages Actions shows the feasibility of a sector-specific harmonization of procedural rules at the EU level. Furthermore, there are examples of other sector-specific harmonization in the field of public procurement,¹⁶⁵⁸ and cases regarding discrimination based on sex.¹⁶⁵⁹ As a consequence, a more comprehensive sector-specific harmonization of procedural rules governing antitrust damages actions would be justified since the new Directive fails to guarantee the effectiveness of the EU antitrust rules.

Ultimately, the extent of a possible further harmonization of the rules governing antitrust damages actions will depend on which procedural changes are deemed necessary in order to enhance private antitrust enforcement, and which categories of claimants should principally benefit from the enhanced rules. For instance, if the aim is to improve only consumers' possibilities of seeking damages, then it might well be feasible to implement some form of collective action that would be available for all consumers regardless of whether the harm that they have suffered arises, for example, from an antitrust violation, unfair competition, or product liability.

Finally, access to justice aspects must be considered. In mass claims, on the one hand, the procedural rights and freedoms of all the parties involved must be protected. On the other hand, access to justice should also be reasonably effective for those who have

¹⁶⁵⁷ See JACOBS, F.G., "Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective" in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001, Effective Private Enforcement of EC Antitrust Law*, Oxford – Portland Oregon, 2003, pp. 187-232, at p. 223.

¹⁶⁵⁸ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ L* 134, 30.4.2004, p. 114–240.

¹⁶⁵⁹ Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, *OJ L* 14, 20.1.1998, p. 6–8.

small claims, which in turn also improves the compliance with the law.¹⁶⁶⁰ The obligation to ensure access to justice in the EU flows from Article 47(1) of the EU Charter of Fundamental Rights which prescribes the need to ensure an effective remedy to everyone “*whose rights and freedoms guaranteed by the law of the Union are violated*”. When the Court of Justice and the national courts implement EU law, they must ensure that effective remedies under Article 47 are available.

This obligation also applies when national courts rule on antitrust damages actions, which was evidenced by *Otis*. In this case, the Commission brought several antitrust damages actions before the Commercial Court in Brussels seeking compensation for the harm that it and other EU institutions had suffered as a result of cartels for installation and maintenance of lifts and elevators. The Commission had fined the four lift operators in February 2007 for an infringement of Article 101 TFEU for operating those cartels. The Court of Justice considered that the European Union, in its capacity of a customer, had a right to effective judicial protection under Article 47(1) of the EU Charter of Fundamental Rights, and could bring the damages claim even though it had itself decided on the existence of the infringement in question. The fact that the infringing companies had a right to judicial review of the validity of that decision, together with the fact that the Commission was not allowed to use information gathered during its investigation of the cartel for other purposes than that investigation, were sufficient to ensure an equality of arms. Moreover, the issues of loss and causal relationship would be assessed by the Court,¹⁶⁶¹

As in particular consumers currently generally fail to obtain compensation for harm suffered as a result of antitrust violations, there seems to be a justification for improving access to justice for consumers by harmonizing those procedural rules governing antitrust damages actions which even after the implementation of the Directive on Antitrust Damages Actions create the greatest obstacles to effective redress.

¹⁶⁶⁰ See ZEKOLL, J., “*Comparative Civil Procedure*” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, New York, Oxford University Press, 2008, p. 1327-1362, at p. 1358.

¹⁶⁶¹ Judgment in *Otis and Others*, C-199/11, EU:C:2012:684.

7.2. Modifications to the Measures Included in the Directive on Antitrust Damages Actions

The new Directive on Antitrust Damages Actions harmonizes some of the national rules currently governing the conditions for bringing antitrust damages actions, which in the past have created obstacles to private enforcement. It also codifies some principles of EU law which govern damages actions. However, many of the measures that Member States must introduce are merely minimum harmonization measures, which means that even when the Directive has been implemented, national divergences will remain in a number of areas. This section will suggest how the issues included in the Directive should be modified in order to enhance private enforcement in a more significant way.

Access to evidence is arguably one of the key factors for enhancing private enforcement in the EU. The claimant needs evidence not only to demonstrate the existence of an antitrust violation – unless the Commission or a national competition authority has already found a breach of the EU antitrust rules – but must also show the extent and quantity of the harm which they have suffered as a result of the antitrust violation in question. A particularity of antitrust damages actions is that the relevant evidence required in order to establish an infringement, the damage suffered, and the causal relationship between the antitrust violation and the harm suffered from it, is often held by the infringer or by third parties, which makes it challenging to meet the burden of proof.

The introduction of a minimum disclosure obligation of evidence is therefore crucial considering the information asymmetry which generally exists between the infringers of competition rules and the victims. The extent of the disclosure obligation should strike a balance between the need to facilitate antitrust damages actions and the protection of confidential information, as well as the effectiveness of the public enforcement of the competition rules. It is submitted that the scope of the disclosure obligation provided for in the Directive should be modified in order to better achieve this balance.

The Directive should not exclude any categories of documents as such from this obligation – currently leniency statements and settlement submissions are entirely

excluded from disclosure¹⁶⁶² – but courts should apply a proportionality test to determine whether the documents, or at least a part of the information contained in them, should be disclosed to the claimant in order to make the bringing of an antitrust damages action possible, especially when this would be impossible without access to some of that information. This is also the approach in the existing case law of the Court of Justice,¹⁶⁶³ and there is no need to revisit this issue by limiting the scope of disclosure since, as a result of the proportionality test, only exceptionally would claimants be granted access to information in leniency statements. The risks of undermining public enforcement would thus not be important. Accordingly, national courts should genuinely be able to consider the implications of granting respectively refusing the request of disclosure of evidence for both public and private enforcement instead of protecting public enforcement more than necessary at the cost of private enforcement. The amendments to the Directive could build on the UK model of conducting a document-by-document review of leniency statements taking into account both considerations of proportionality and procedural fairness.¹⁶⁶⁴

Regarding the moment in which disclosure could be requested, it is justified to require the claimant to first present a “*reasoned justification*” containing reasonably available facts and evidence “*sufficient to support the plausibility of its claim for damages*”¹⁶⁶⁵ so as to ensure that the disclosure obligation will not lead to an abuse and unfounded damages actions being brought. It is reasonable to require the evidence to be relevant in terms of substantiating the claim or defense, but the obligation to specify either pieces of this evidence or relevant categories of this evidence defined as precisely and narrowly as possible on the basis of reasonably available facts¹⁶⁶⁶ should not be interpreted too strictly in order not to undermine the usefulness of the possibility of requesting disclosure of evidence.

The minimum disclosure obligation does not appear excessively costly, which could otherwise constitute an impediment to the well-functioning of the competition

¹⁶⁶² Article 6 of the Directive on Antitrust Damages Actions.

¹⁶⁶³ See Judgment in *Pfleiderer* EU:C:2011:389, paragraph 30.

¹⁶⁶⁴ See Section 3.2.1 of this thesis.

¹⁶⁶⁵ Article 5(1) of the Directive on Antitrust Damages Actions.

¹⁶⁶⁶ Article 5(2) of the Directive on Antitrust Damages Actions.

enforcement in the EU. As is sometimes the case in the United States, extensive disclosure obligations might result in significant costs for the parties concerned and, in some cases, also for third parties. In addition, the proceedings could be unduly delayed, thus making it less attractive to bring antitrust damages actions in the first place. As the disclosure obligation will entail modifications to the legal traditions in most Member States, and an excessive disclosure obligation could have the aforementioned negative effects, it seems reasonable to start with a more modest reform of the rules concerning access to evidence and, if it proves not to help facilitating damages claims satisfactorily, then the European Union should consider making the necessary adjustments when the Directive will be reviewed.¹⁶⁶⁷ In the latter case, a possibility would be to oblige the parties to produce all relevant documents in their possession and control as is the case in Canada and the United Kingdom.¹⁶⁶⁸

The Directive on Antitrust Damages Actions only requires Member States to grant final infringement decisions by a national competition authority a probative effect, as far as the finding of an infringement is concerned, in subsequent damages actions brought in the *same Member State*.¹⁶⁶⁹ By not granting probative effect to a NCA Decision regarding the nature of the infringement and its material, personal and territorial scope¹⁶⁷⁰ in cases in which the damages claim is brought before the courts of another Member State, the issue of the existence of an antitrust violation might have to be re-litigated. This will possibly result in a waste of time and resources, and an increase in the costs of the action, although it will depend on the rules of the Member State concerned as it may grant such binding effect under its national legislation.¹⁶⁷¹

In order to facilitate follow-on claims by consumers or other injured parties, who would not be able to bring stand-alone actions, it is submitted that final NCA and competition court decisions should also be given a presumptive binding effect in civil proceedings before the courts of other Member States. The defendant should be allowed to rebut this

¹⁶⁶⁷ The Directive on Antitrust Damages Actions will be reviewed within four years from its implementation. *See* Article 20 of the Directive.

¹⁶⁶⁸ *See* Sections 3.2.1 and 6.2.2.

¹⁶⁶⁹ Article 9 of the Directive on Antitrust Damages Actions.

¹⁶⁷⁰ Recital 31 of the Directive on Antitrust Damages Actions.

¹⁶⁷¹ For instance, Germany grants binding effect to decisions of the NCAs of other Member States. *See* Section 3.3 of the thesis.

presumption if it would breach the requirements of fair trial, or the geographical scope of the infringement would make it irrelevant with regard to the damages claim in relation to the market in the Member State in which it is brought.¹⁶⁷² In addition, the presumption of binding effect could be rebutted if there were manifest errors of facts in the investigation. Finally, the national court cannot give binding effect to a decision of a foreign NCA if that would breach Article 6 of the European Human Rights Convention or Articles 47 and 48 of the Charter of Fundamental Rights of the European Union.

The Directive on Antitrust Damages Actions provides some common rules regarding limitation periods which will contribute to increased legal certainty and should facilitate the bringing of damages claims especially in Member States the limitation periods of which are currently very short.¹⁶⁷³ The requirement that the victim must have knowledge of the infringement and the harm that it has caused him before the limitation period begins to run¹⁶⁷⁴ is crucial as otherwise the limitation period might have expired even before the victim learned about the infringement. However, common guidelines should be provided on the criteria that should be assessed in order to determine whether the claimant had such knowledge, as it would otherwise result in uncertainty about the moment from which the limitation period starts to run. By only providing for minimum limitation periods, the Directive respects the principle of procedural autonomy, and a 5-year minimum limitation period for stand-alone actions is sufficiently long to enable injured parties to bring damages claims. For situations not specifically regulated by the Directive, the limitation periods must respect the limits established by the principles of equivalence and effectiveness.

The limitation period of one year for follow-on actions should be sufficient when the damages claim is brought in the same Member State from which the infringement decision originates. But if the claim is brought before the courts of a Member State other than the one where the decision originates, the limitation period could be too

¹⁶⁷² See BASEDOW, J., “Recognition of Foreign Decisions with the European Competition Network” in BASEDOW, J., FRANCO, S. and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, 2012, p. 393-402, at p. 397 and 401-402.

¹⁶⁷³ See CRAIG, L., JAZRAWI, W., GARTAGANI, S., SIAKKA T. and FITZGERALD-FRAZER, K., “A summary of recent developments in antitrust damages claims, collective redress and funding in the EU and UK”, *G.C.L.R.*, 6(3), 2013, R41-R47, at R43.

¹⁶⁷⁴ Article 10 of the Directive on Antitrust Damages Actions.

short, unless the decision of the foreign NCA constitutes at least a rebuttable presumption of the existence of an infringement. A possible solution would be to impose a minimum limitation period of two years in such cross-border cases, as was initially suggested in the White Paper on Antitrust Damages Actions.

The Directive on Antitrust Damages Actions establishes that undertakings are jointly and severally liable for harm caused by their joint behavior.¹⁶⁷⁵ However, an undertaking which has been granted immunity under a leniency program will be liable to injured parties other than its direct or indirect purchasers or providers only if they were unable to obtain full compensation from the other infringers. It is crucial that the limited liability of immunity recipients only applies in case the injured parties are able to claim damages from other cartel members as otherwise the right to full compensation of victims of cartels could be put at risk. For the same reason, the limited civil liability must not be extended to other leniency applicants than immunity recipients.

The provisions governing liability aim to restrict the liability of an undertaking which has been granted immunity, but can only do so to a limited extent since victims' right to full compensation must always be respected and, as the damages awarded are only single damages, the possibility of restricting the liability in damages is limited. It is submitted that in amending the Directive in the future, the possibility of imposing double damages for hard-core cartels should be reexamined as damages could then be used to grant immunity applicants additional incentives to reveal the existence of a cartel in exchange of only being obliged to pay single damages. A similar model operates in the United States where the successful immunity (amnesty) applicant will merely have to pay de-trebled damages.¹⁶⁷⁶

These provisions also make it possible for injured parties to choose to bring damages actions against the defendant which is most likely to be able to pay the compensation. From the claimants' point of view this simplifies litigation as they could obtain compensation from one single defendant for the whole harm that they have suffered. The claimants do not have to be direct customers of the defendant, but in line with

¹⁶⁷⁵ Article 11 of the Directive on Antitrust Damages Actions.

¹⁶⁷⁶ See YSEWYN, J., "Private enforcement of competition law in the EU: trials and tribulations", *International Law Practicum*, 19-Spring, 2006, p. 14-19.

ÖBB-Infrastruktur,¹⁶⁷⁷ as long as they can demonstrate that the defendant should have taken into regard that the anti-competitive conduct could result in the loss that the injured parties have suffered, the defendant could be held liable in civil damages. This would at least be the case in infringements giving cause to umbrella-pricing. For the defendant this could result in uncertainty about whether it would be able to seek contribution from its co-infringers because some might have ceased to exist, and the costs of determining the relative responsibility of each co-infringer for the harm caused to injured victims could be high.¹⁶⁷⁸

The Directive on Antitrust Damages Actions permits the passing-on defense, but the infringer has the burden of proof that the overcharge has been passed on.¹⁶⁷⁹ The burden of proof relating to passing-on is different in cases involving indirect purchasers claiming compensation for damages resulting from an overcharge which has wholly or partly been passed on to the claimant. Indirect purchasers must demonstrate the existence of such pass-on, although reasonable requests for disclosure from the defendant and third parties will be allowed.¹⁶⁸⁰ Allowing the passing-on defense could constitute an obstacle for antitrust damages actions, because indirect purchasers and, especially consumers at the end of the distribution chain, will encounter large difficulties in proving the exact amount that has been passed on to them, particularly in situations involving several intermediaries. In order to mitigate the effects of a passing-on defense, consumers should, arguably, have a possibility of joining forces in a collective or representative action in order to share the litigation costs. It could, for instance, be envisaged that a first proceeding would focus on the liability and aggregate damages in the case, and second proceeding would deal with the determination of individual damages.

As to the quantification of harm, the Directive contains a rebuttable presumption of harm resulting from a cartel.¹⁶⁸¹ The Commission has also issued guidelines on the

¹⁶⁷⁷ See Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317, paragraph 37.

¹⁶⁷⁸ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.*, Volume 35, Issue 2, 2014, p. 51-55, at p. 54.

¹⁶⁷⁹ Article 13 of the Directive on Antitrust Damages Actions.

¹⁶⁸⁰ Article 14(1) of the Directive on Antitrust Damages Actions.

¹⁶⁸¹ Article 17(2) of the Directive on Antitrust Damages Actions.

quantification of harm in antitrust damages actions.¹⁶⁸² Although they are not binding, the assessment of harm has been improved by giving a greater role to national judges, and by making the involvement of competition authorities in the assessment of harm possible.¹⁶⁸³ This could at least somewhat facilitate the compensation especially of indirect purchasers which generally have the largest difficulties in proving the exact amount of harm that has been passed on to them.

But other issues still need to be addressed.¹⁶⁸⁴ There should be some common rules for causation, remoteness or quantification of loss in order to reduce national divergences. Furthermore, even after the implementation of the Directive on Antitrust Damages Actions, the burden of proof and the standard of proof with regard to quantification of harm will largely be determined according to the national rules, which must respect the principles of equivalence and effectiveness. National courts will also have discretion to decide to what degree they will follow the non-binding guidelines for quantification of harm, so again the methods relied on may significantly vary from one Member State to another.¹⁶⁸⁵ It is also to be expected that economic evidence will prolong and make litigation more expensive.¹⁶⁸⁶ Although the type and scope of harm will depend on the particular antitrust violation, and should therefore be assessed on a case-by-case basis, the need for some binding minimum standards should be considered in light of the experience of the Member States when the Directive is reexamined.

The Directive also aims to encourage consensual dispute resolution which could sometimes offer consumers, and maybe also SMEs, a possibility of obtaining at least some compensation since, without effective collective redress mechanisms, their current

¹⁶⁸² See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ C* 167, 13.6.2013, p. 19-21; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

¹⁶⁸³ Article 17(3) of the Directive on Antitrust Damages Actions.

¹⁶⁸⁴ See Section 7.3. for more details.

¹⁶⁸⁵ See VANDENBORRE, I., HOFFMAN LENT, K. and GOETZ, T.C., “Actions for antitrust damages in the European Union: evaluating the Commission’s Directive proposal”, *G.C.L.R.*, 7(1), 2014, p. 1-9, at p. 5.

¹⁶⁸⁶ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.*, Volume 35, Issue 2, 2014, p. 51-55, at p. 53.

exercise of the right to compensation is limited in most Member States. However, given the advantageous provisions for settling co-infringers (e.g. suspension of antitrust damages proceedings, reduced liability for settling co-infringers, and limited contribution obligation), there could be a risk that the Directive would in practice rather result in increasing alternative dispute resolution at the cost of damages claims. This could be problematic because injured parties generally tend to be the weaker party and, in that case, there will not be equality of arms since the infringers tend to have access to most of the relevant evidence needed to prove the infringement and the extent of the damage. In order to remedy this problem, a binding EU-wide collective action should be introduced which would serve as an alternative means of redress in case settlements result in unsatisfactory outcomes, or are otherwise not feasible or desirable.

7.3. Additional Issues That Should Be Harmonized or Approximated

The most noteworthy omission from the Directive on Antitrust Damages Actions is the lack of any kind of collective redress mechanism. Instead, the Commission has chosen to introduce non-binding recommendations on collective redress mechanisms.¹⁶⁸⁷ The Commission Recommendation on Collective Redress proposes some common principles for injunctive and compensatory collective redress concerning standing to bring a representative action, admissibility of such actions, information about collective actions, reimbursement of legal costs of the winning party, funding, and cross-border cases.¹⁶⁸⁸ For compensatory collective redress, it contains recommendations relating to the construction of the group based on the “opt-in” principle, collective ADR and settlements, legal representation and lawyers’ fees, punitive damages, funding, and collective follow-on actions.¹⁶⁸⁹ These are all important issues to consider in designing an optimal compensatory collective action but, arguably, the legal instrument chosen will fail to bring about a significant improvement of compensatory collective relief in a medium-term. Instead, a directive would be a more efficient legal instrument, since it imposes binding obligations on the Member States, while it still allows the respect of

¹⁶⁸⁷ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

¹⁶⁸⁸ Part III of the Recommendation on Collective Redress Mechanisms.

¹⁶⁸⁹ Part V of the Recommendation on Collective Redress Mechanisms.

different legal traditions, and leaves Member States some choice as to the form of the measures to be implemented.

Moreover, the recommendations are not sufficiently extensive because the common principles laid down are generally based on encouraging a modest form of collective actions and conservative means of funding. In the next sections, a proposal will be made for how private enforcement should be enhanced by harmonizing/approximating collective actions and the costs rules governing antitrust damages actions.

7.3.1 Collective Actions

The design of the collective action will first and foremost depend on what the aim of introducing a collective action is, i.e. which legal problems it is supposed to solve. As injunctions can only have an effect on the infringer's behavior in the future, whereas damages claims can also be used retroactively to deprive the infringer of the benefits gained as a result of the infringement¹⁶⁹⁰ and ordering it to compensate victims, the improvement of private enforcement would require a collective action under which it is also possible to seek damages, and not only injunctive relief.

In order to design a more efficient collective redress mechanism, at least the following fundamental issues have to be decided: the standing to bring an action, i.e. is there a need to allow both representative actions brought by qualified entities and collective actions brought by individuals; how possible qualified entities should be determined, and how the group of claimants should be defined (i.e. should the collective action be based on the "opt-out" or the "opt-in" principle); the quantification and distribution of damages; and the applicable cost rules and funding of such actions. In addition, issues such as safeguards against abuse must be considered.

Regarding standing to bring a collective claim, it should be recalled that EU law confers standing to bring antitrust damages actions to any individual that has suffered harm as a result of an infringement of the EU antitrust rules. Accordingly, it would be justified that all injured parties should have a right to enhanced mechanisms for seeking

¹⁶⁹⁰ See MIEGE, C., "*Modernisation and Enforcement Pluralism – The Role of Private Enforcement of Competition Law in the EU and the German Attempts in the 7th Amendment of the GWB*", in the Workshop "*Remedies and Sanctions in Competition Policy*", Amsterdam Centre for Law & Economics (ACLE), Universiteit van Amsterdam, February 17th, 2005, at p. 50.

compensation. This would also enhance the effectiveness of the EU competition rules, and increase deterrence, the other goal of competition law enforcement. But even if all categories of claimants are entitled to bring antitrust damages actions, it should be decided whether they should have the right to bring collective damages claims themselves, or whether representative bodies, such as consumer associations and trade associations defending the interests of their members active in a given industry, should bring actions on behalf of victims of antitrust violations.

It is submitted that the introduction of both representative and collective actions would be appropriate. Actions brought by a representative body reduce the risk of frivolous actions since the representative body must usually be authorized to bring representative actions, such as consumer and user associations belonging to the Council of Consumers and Users in Spain. Moreover, the representative body does not have a financial interest in the outcome of the litigation, but acts in a *quasi* public interest capacity.¹⁶⁹¹ The financial risk for consumers is reduced, since consumers' associations normally pay the trial costs, and consumers will be compensated if the action succeeds.¹⁶⁹²

The criteria for determining which bodies would be qualified to represent the victims must serve to limit the abuse of unfounded claims being brought. Nevertheless, these criteria should not create unnecessary hurdles that render it difficult to bring meritorious claims. The criteria established in the Commission Recommendation on Collective Redress seem justified since they establish that representative bodies should meet specific criteria laid down in the law, or be subject to *ad hoc* approval in a specific case.¹⁶⁹³ This latter possibility is particularly important because entities designated in advance might not necessarily always be apt to act in the best interest of the claimants, be it because of the influence of political interests, or the lack of financial resources.

It is also crucial that collective actions can be brought by individuals (both natural and legal persons) in order to ensure to a higher degree that injured parties also have an effective redress mechanism available if representative bodies, due to priority reasons or

¹⁶⁹¹ See OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 24.

¹⁶⁹² This is the situation, for example, in France. See France – National Report, 15 November 2006, prepared for the Consumer Redress Study, at p. 15.

¹⁶⁹³ Point 6 of the Recommendation on Collective Redress Mechanisms.

other reasons, decide not to bring an action. In addition, the fact that representative actions have not been brought extensively despite that they are widely available in the Member States¹⁶⁹⁴ also shows that sufficient financial means to fund the actions, and other improvements (e.g. allowing the representative body to base the action on the “opt-out” principle) would be indispensable for these actions to work in practice.

The most controversial issue when designing a collective action regime is the choice between “opt-in” and “opt-out” mechanisms, since it decides whether a person’s legal rights can be determined without his express consent.¹⁶⁹⁵ In general, the main opinion in the European doctrine appears to be that an individual should be free to choose whether to become involved in litigation and also who should represent him.¹⁶⁹⁶ The possibility of not being bound by the outcome of the litigation would thus guarantee the right to a fair trial enshrined in Article 47 of the EU Charter of Fundamental Rights and Article 6 of the ECHR.

However, one of the main problems of the existing collective redress mechanisms at national level is precisely that they are commonly based on the “opt-in” principle, and the costs of the actions constitute a significant barrier for bringing collective antitrust damages actions. The *Football Shirts*¹⁶⁹⁷ and *Mobile Cartel*¹⁶⁹⁸ cases in the United Kingdom and France illustrate the limited efficiency of the “opt-in” model. As stated, the first case only resulted in the compensation of a small fraction of the injured parties, and the second case failed.¹⁶⁹⁹

¹⁶⁹⁴ See HODGES, C., “Europeanization of civil justice: trends and issues”, *C.J.Q.*, 26(JAN), 2007, p. 96-123, at p. 115.

¹⁶⁹⁵ See MULHERON, R., “Some differences with Group Litigation Orders – and why a class action is superior”, *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 50.

¹⁶⁹⁶ See e.g. MICKLITZ, H.-W., and STADLER, A., “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1499, TARUFFO, M., “Some Remarks on Group Litigation in Comparative Perspective”, *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 416-417, and OFFICE OF FAIR TRADING, “*Private actions in competition law: effective redress for consumers and business*”, Discussion Paper, OFT916, April 2007, at p. 20.

¹⁶⁹⁷ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07.

¹⁶⁹⁸ See <http://www.cartelmobile.org/>.

¹⁶⁹⁹ See Sections 3.2.1 and 3.4.1 of this thesis.

Therefore, if the individual consumer's loss is very small, he might not be interested in joining the collective action once he learns about it, and it is possible that the action will not be brought at all because there are not sufficient claimants to merit bringing the action. If the number of potential claimants is large, the total amount of loss not compensated to consumers might be significant even though the individual losses were limited.¹⁷⁰⁰ Thus, it would be important to ensure that opt-out collective actions were possible in these cases. This would also be important in order to deter infringements, as the financial risks could be significant if the action could be brought on behalf of the maximum number of claimants.

Nevertheless, the collective action model that is ultimately chosen must be compatible with the European legal systems and traditions, and the model chosen should actually work in practice. For example, constitutional limitations in certain Member States might diminish the possibility of introducing certain types of collective actions, and some constitutional changes could be required in addition to procedural changes. In Germany, the German Constitution restrains the possibility of an individual being bound by a judgment given in a proceeding in which he did not participate, or was not given the possibility to intervene.¹⁷⁰¹ In general, the traditional legal principle in the legal systems of the Member States is that the outcome of a case is binding only *inter partes*.¹⁷⁰² Consequently, the "opt-in" model would correspond most closely to this legal understanding.¹⁷⁰³

However, an "opt-out" model should at least be available in cases involving numerous low-value claims in order to ensure access to justice, and an effective remedy compliant with Article 47 of the EU Charter of Fundamental Rights. Courts should be able to decide at the certification stage whether the collective action should be brought based on the "opt-in" or "opt-out" principle on a case-by-case basis. The obligation to give proper notice to potential group members about the claim would also reduce the risk of

¹⁷⁰⁰ See OFFICE OF FAIR TRADING, "Private actions in competition law: effective redress for consumers and business", Discussion Paper, OFT916, April 2007, at p. 20.

¹⁷⁰¹ See Impact Study, at p. 272.

¹⁷⁰² However, in Spain, it stems from Article 222 of the Civil Procedure Law that a collective action brought by a consumer association would also be binding on the consumers. See Section 3.5.

¹⁷⁰³ See Impact Study, at p. 272.

group members being bound by a judgment or settlement resulting from a collective action. Opt-out class actions have been claimed to deny a right to fair hearing because an individual must take active steps to avoid the legal effects of the action by opting out from it in time.¹⁷⁰⁴ If he does not, he is barred from bringing an individual action if the action is unsuccessful, or his damages award is insufficient.¹⁷⁰⁵ But as the individual claims would be too small to be enforced individually, in the worst-case scenario the claimant would be left without any compensation, which would have been the case also if the actions had not been brought on his behalf, while in the best-case scenario he would receive some compensation for the loss that he has suffered. In other words, he would not be seriously disadvantaged even if he did not learn about the collective action in time to opt out.¹⁷⁰⁶ It should also be noted that in the United States, the number of class members who choose to opt out from the class is very low,¹⁷⁰⁷ which implies that, at least in the United States, there is a general acceptance of this type of collective actions. But it would be important to ensure that group members which have not been notified about the collective action in time to exercise their right to opt out would not have to pay any adverse costs.

Arguably, in certain cases it could be justified to certify subgroups on different grounds, for instance by applying the “opt-in” requirement to non-resident group members, and the “opt-out” principles to residents in order to ensure that non-residents, who it is possibly more difficult to notify properly about the action, would not be bound by the outcome of an opt-out collective action. Moreover, safeguards should be adopted to ensure that the same harm is not being compensated several times through various actions brought for instance before the courts of different Member States. This hybrid model should usually allow for ensuring the sufficient size of the group in order to merit the action, while it would avoid that non-resident group members would be bound by a

¹⁷⁰⁴ See MICKLITZ, H.-W., and STADLER, A., “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1499.

¹⁷⁰⁵ See MILUTINOVIC, V., “Private Enforcement. Upcoming Issues” in AMATO, G. and EHLERMANN, C-D, *EC Competition Law*, Hart Publishing, Oxford and Portland, Oregon, 2007, p. 725-757, at p. 752.

¹⁷⁰⁶ LESKINEN, C., “Recent Developments on Collective Antitrust Damages Actions in the EU”, *G.C.L.R.*, Volume 2, No 4, 2011, p. 79-88, at p. 87.

¹⁷⁰⁷ See SHERMAN, E.F., “American class actions: significant features and developing alternatives in foreign legal systems”, 215 *Federal Rules Decisions* 130, 2003.

judgment against their will. This model is used in a few Canadian provinces,¹⁷⁰⁸ and will also be applied in the United Kingdom when the new collective action enters into force.¹⁷⁰⁹

Criteria for certification of the group must be established both for “opt-in” and “opt-out” collective actions. Guidance should also be provided on criteria to take into account in assessing whether the interests of the group members are adequately protected and the group representative is able to efficiently pursue the action. In particular in cross-border collective actions, the court seized with the case should ensure that the requirements of procedural fairness (such as adequate notice) are met.¹⁷¹⁰

The quantification and distribution of damages can also be challenging in collective actions, and mechanisms for doing this should be included in the EU collective redress legislation. The issue of distribution of damages is important especially in cases involving claimants at different levels in the distribution chain. Although the main objective should be full compensation of the harm, unclaimed damages could be allocated on *cy pres* basis, or go to a fund for financing future collective damages claims. In order to take the most advantage of the collective action, an option would be to consolidate the claims of indirect purchasers with the claims of direct purchasers. In a first proceeding, the defendants’ total liability to all the claimants as a group should be established, whereas the allocation of damages among the direct and indirect purchasing claimants should be conducted in a second proceeding. The first trial would determine the total overcharge that the price-fixing has resulted in, while the second trial would allocate the damages between the various purchasers in the distribution chain.¹⁷¹¹ In this manner, the risk of defendants being liable multiple times for the same infringement would be eliminated, and the allocation of damages awarded could be a question among

¹⁷⁰⁸ See Section 6.2.3 of the thesis.

¹⁷⁰⁹ See Section 3.2.1 of the thesis.

¹⁷¹⁰ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 278-279.

¹⁷¹¹ See BAKER, D.I., “The Future of Private right of Action in Antitrust”, *Loyola Consumer Law Review*, 16, 2004, p. 379-408, at p. 394-396.

plaintiffs. If the individual damages were too small, the award could be used for the common benefit of the claimants or groups of claimants, or some other related purpose.

Once the preferred model for collective action has been chosen, it must be decided how the actions should be funded. The funding of collective actions is a crucial element for the success of the collective action, since funds are needed already at the initial stage of the action and, therefore, the funding question needs to be solved. Possible funding options include funding by the victims bringing the actions, representative bodies, legal aid mechanisms or other publicly or privately administered funds, lawyers contracted under contingency fee arrangements, insurance companies etc.¹⁷¹² Again national legal systems may limit the funding options, for example, because contingency fees are prohibited in some Member States.¹⁷¹³

Since public funding is decreasing,¹⁷¹⁴ there is a need to ensure sufficient funding of collective actions by introducing contingency fees in the EU to fund collective actions. Because the lawyers' fees would depend on the success of the claim, they would have a strong incentive only to accept cases that are likely to succeed. Provided that contingency fees are subject to judicial scrutiny, or regulated in another effective manner, their possible negative effects can be reduced.¹⁷¹⁵ Also other ways of alternative funding, for instance by third-party finance institutions should be possible, provided that possible conflicts of interest are eliminated, and the amount of the damages is subject to court approval in order to ensure a fair outcome for the group.

Furthermore, by limiting the obligations of group members to pay the legal costs to the group representative and to those members who have *de facto* had an opportunity to exercise their right to opt out, the opt-out collective action should not generally pose any constitutional problems.

¹⁷¹² See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 17.

¹⁷¹³ This is the case e.g. in France. See Article 10 of Act n°71-1130 of December 31st, 1971 on the reform of certain legal professions.

¹⁷¹⁴ See HODGES, "Europeanization of civil justice: trends and issues" *C.J.Q.*, 26(JAN), 2007, at p. 99-100.

¹⁷¹⁵ *Ibid.*, at p. 108.

Moreover, courts should be able to adjust the “loser pays” rule in line with Directive 2004/48/EC in order to encourage that damages claims are being brought. Courts could also be allowed to cap costs and adjust litigation costs by limiting them to what is considered reasonable and proportionate.¹⁷¹⁶ In addition, any reference to punitive damages being prohibited should be eliminated as the Court of Justice has held that they are not contrary to EU law.¹⁷¹⁷

Other issues which have not been considered in a satisfactory way include the coordination of public and private actions in a cross-border situation, and the jurisdictional rules. In those areas of law where a public authority can adopt a decision finding that there has been a violation of EU law, the national authority should be able to act as an *amicus curiae* in the collective redress action so as to not automatically prolong the collective redress proceedings or to impede stand-alone actions. This is justified especially in those cases where the decision by a national competition authority establishing an infringement does not assess whether the infringement has actually caused harm, since its file might be of limited value for proving the damage. Moreover, it would be necessary to ensure the coherent and uniform application of the EU antitrust rules when proceedings are brought before an NCA of one Member State and, simultaneously, an antitrust damages action is brought before a court of another Member State.¹⁷¹⁸

Most importantly, the EU-wide collective action for cross-border cases should be introduced by a directive in order to enhance access to justice. The directive should also regulate the distribution of damages, and the allocation of costs between group members. The courts should play a significant role in ensuring the fairness of the collective actions to all the parties by certifying the group or sub-groups, approving settlements and attorneys’ fees, and by being allowed to adjust the costs of the litigation, if necessary because of equity reasons.

¹⁷¹⁶ See LESKINEN, C., “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121, at p. 119.

¹⁷¹⁷ See Judgment in *Manfredi*, EU:C:2006:461, paragraph 93.

¹⁷¹⁸ See DANOV, M. and BECKER, F., “The Way Forward: A Strong Case for Reform at EU Level” in DANOV, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 407-420, at p. 416-417.

7.3.2 Cost Rules

High litigation costs are often one of the greatest obstacles to private enforcement in the EU regardless of whether the antitrust damages actions are individual or collective, especially for consumers with small individual claims. In addition, the “loser pays” principle applies in most Member States,¹⁷¹⁹ which increases the risks of bringing an antitrust damages action. However, the Directive on Antitrust Damages Actions does not contain any specific provisions on the costs of antitrust damages actions. The White Paper, in turn, recognized the problem of high litigation costs, and encouraged the Member States to reflect on how they could adjust their cost rules and court fees to facilitate meritorious actions.¹⁷²⁰

When the Directive on Antitrust Damages Actions is reviewed (within four years from its implementation), some modifications to the cost rules should be made regarding antitrust damages actions in general. To start with, a modification of the “loser pays” principle should be considered in line with Directive 2004/48/EC on the enforcement of intellectual property rights. That directive allows courts to derogate from the “loser pays” principle if its application does not lead to a fair result in the case at issue.¹⁷²¹ This would enhance access to justice by reducing the costs for bringing antitrust damages actions. Due to the same reason, a capping of the costs might also be justified especially in situations necessitated by fairness considerations.

The cost rules should also make contingency fees available, or improve public financing. The advantage of contingency fees is that they provide additional incentives to bring an action thanks to the right of the attorney to recover part of the damages award if the action is successful. Moreover, since lawyers’ fees depend on the success of the action, lawyers are more likely to accept cases that are expected to bring them large awards, so contingency fees serve to filter of meritorious actions. The same

¹⁷¹⁹ See Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 74.

¹⁷²⁰ See Commission White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, at p. 9.

¹⁷²¹ See LESKINEN, “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121, at p. 119.

objective is achieved by the fact that their reputation as lawyers is also at stake.¹⁷²² Nevertheless, contingency fees would provide less incentive in jurisdictions which apply the “loser pays” rule, since the lawyer would have to pay any adverse costs of an unsuccessful case. In addition, in such cases he would not receive any fee, which increases the risks in spite of the contingency fee arrangement. It is therefore necessary to examine all the applicable procedural rules in a particular jurisdiction in order to assess what the effect of introducing contingency fees would be, and what other rules might have to be adjusted in order to enhance private enforcement.¹⁷²³

The possible damages must also be sufficiently large for contingency fees to work,¹⁷²⁴ because otherwise the possibility of obtaining a percentage of the recovery would not be sufficient to incentivize damages actions under a contingency fee arrangement. In the EU, it would be difficult to ensure this since most jurisdictions only award compensation for the actual damages.¹⁷²⁵ If other adjustments are not made, any contingency fee agreement based on a share of the recovery would bar the claimant from obtaining full compensation. But even if the claimant will not obtain full compensation, it could still be better off under such an arrangement if its claim would not be economically viable to be enforced at all without the contingency fee arrangement.

Moreover, in order to avoid possible abuse, appropriate safeguards should be adopted, which could, for example, consist in empowering courts to approve and adjust contingency fees.

¹⁷²² See SHAJNFELD, A., “A critical survey of the law, ethics, and economics of attorney contingent fee arrangements” *N.Y.L. Sch. L. Rev.* 54 (2009/2010), p. 773, at p. 776-777.

¹⁷²³ See SITTENREICH, M.A. “The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions”, *Fordham L. Rev.*, 78, April, 2010, p. 2701-2750, at p. 2747.

¹⁷²⁴ *Ibid.*

¹⁷²⁵ Commission Staff Working Paper SEC(2008) 404 accompanying the White Paper on Damages actions for breach of the EC antitrust rules COM(2008) 165 final, 2.4.2008, at p. 56. But also in the United States, treble damages tend to be equivalent to single damages since they do not include prejudgment interest and other factors, such as allocative inefficiency effects felt by society, and the value of the time claimants have spent on litigation. See LANDE and DAVIS, “*Of Myths and Evidence: An Analysis of 40 U.S. Cases for Countries Considering a Private Right of Action for Competition Law Violations*”, at p. 16, available at <http://ssrn.com/abstract=1474804>.

Another option to improve financing of antitrust damages action would be to allow for litigation-finance companies or other third parties to fund such actions. Nevertheless, in these cases sufficient safeguards must be put in place in order to avoid that they abuse their influence in the case, and to ensure that the percentage of possible damages awards which the claimant has to pay to the funders are reasonable. It should also be noted that litigation-finance companies generally require a rather high likelihood of success, at least 60%, in order to be interested in funding a case,¹⁷²⁶ which could limit its usefulness in meritorious, but uncertain cases.

If there is a lack of sufficient support for adopting certain rules governing the costs of antitrust damages actions, the Commission should at least issue recommendations concerning the cost rules for antitrust damages actions.

7.4. Implementation of the Proposed Private Enforcement Model

7.4.1. Preliminary Observations

Until the new Directive on Antitrust Damages Actions has been implemented, antitrust damages actions in the European Union will be governed by national rules. This means that each Member State is able to decide on the conditions for bringing such actions, subject to the limits imposed by the principles of equivalence and effectiveness as well as the duty of sincere cooperation under Article 4(3) TEU.¹⁷²⁷ As to collective actions, the Commission Recommendation on Collective Redress Mechanisms is already applicable, but since it is merely a recommendation, the Member States may decide to what extent they are willing to follow the various recommendations contained in it.

As has been demonstrated in Chapter 3, many obstacles still remain in most Member States, and even in the Member States with more antitrust damages actions, consumer claims are seldom brought, and have to date had limited success. The finding of the Ashurst Study that the means of actions available in different Member States for bringing damages claims show a high diversity,¹⁷²⁸ which is a result of a great

¹⁷²⁶ See MARTIN, E., “And then there were three”, *Euro. Law*, 81, 2008, p. 30, at p. 31.

¹⁷²⁷ See Section 7.4.2 for more details.

¹⁷²⁸ See Ashurst Study, at p. 1.

divergence between national procedural rules¹⁷²⁹ still holds true. As has been explained in Section 7.2, although the Directive on Antitrust Damages Actions will harmonize certain rules governing antitrust damages actions, often it will only result in minimum harmonization. Therefore the divergences will prevail, for instance, in respect of causation and quantification of harm. Most notably, collective redress and costs rules will be determined by national rules.

Furthermore, already in its Green Paper on antitrust damages actions, the Commission underlined the importance of the same protection of the rights of European citizens across the whole EU.¹⁷³⁰ This requirement also stems from *Courage*, pursuant to which any individual who has suffered harm as a result of an infringement of the EU competition rules has the right to seek compensation.¹⁷³¹

Thus, it would appear that at least a certain level of additional harmonization or voluntary coordination of legislative measures is required in order to ensure the right to damages and to avoid forum-shopping, but the question is how such a harmonization should be implemented. For instance, legislative action at the Union level is needed at least regarding certain issues, which currently create the main obstacles to bringing antitrust damages claims. But, it could also be envisaged that for other issues which are more difficult to harmonize, only guidelines or recommendations would be issued by the Commission, while the decision on concrete measures would ultimately be left to each Member State.

Regarding collective actions, 30 years ago, the Commission concluded that due to the diversity and complexity of the national systems it was not possible to propose a harmonization of national collective actions for consumers.¹⁷³² However, the picture has remarkably changed since then, because improved collective actions have been adopted

¹⁷²⁹ See HODGES, C., “Europeanization of civil justice: trends and issues”, *C.J.Q.* 2007, 26(JAN), p. 96-123, at p. 10-11.

¹⁷³⁰ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 16.

¹⁷³¹ See Judgment in *Courage*, EU:C:2001:465, paragraph 24.

¹⁷³² See Memorandum from the Commission: “Consumer redress”, Commission of the European Communities, COM(84) 692, 12.12.1984.

in various Member States.¹⁷³³ But obstacles to overcome remain. For example, the legal and cultural backgrounds of the Member States differ, the existence of a legal basis for introducing the action is debated, and some resistance by Member States is probable.

However, what issues should be harmonized, and to what extent, as well as the instrument for achieving that harmonization will ultimately depend on what goals private enforcement aims to achieve. Arguably, these goals include both compensation and deterrence, although the focus is more on the compensatory function. But deterrence is an important “by-product” justifying why there is a need for effective private enforcement in the first place, since compliance with the EU antitrust rules requires a combination of effective public and private enforcement. In addition, there must be a legal basis for the envisaged measures.

Finally, it should be noted that harmonization of procedural rules has increasingly been happening in the EU, and have usually been due to practical needs linked with market integration objectives.¹⁷³⁴

7.4.2. *Soft-law Instruments v. Harmonization*

Soft-law could be used to achieve some more convergence in antitrust damages actions. The Commission could issue recommendations and/or guidelines on issues that it would find important for the enhancement of private antitrust actions. This is indeed what it has done so far in the field of antitrust damages actions: on the one hand, it has issued recommendations regarding collective redress mechanisms¹⁷³⁵ and, on the other hand, it has issued guidelines about the quantification of damages in antitrust cases.¹⁷³⁶ The advantage of this approach is that such recommendations and guidelines can quickly be elaborated, and they will not encroach on the legal systems of the Member States

¹⁷³³ This would be the case e.g. of the United Kingdom, France, Sweden and Portugal.

¹⁷³⁴ See ZEKOLL, J., “*Comparative Civil Procedure*” in REIMANN, M. and ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, New York, 2008, p. 1327-1362, at p. 1341.

¹⁷³⁵ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

¹⁷³⁶ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ C* 167, 13.6.2013, p. 19-21.

because of their voluntary nature. However, a significant drawback of this option is that the soft-law instruments are not binding on the Member States, so it is questionable if they could really serve for much more than to provide useful guidance on particular issues for national legislators and courts willing to take them into consideration.

The adoption of a binding instrument, either a directive or a regulation, would have the advantages of obliging Member States to achieve a particular result. Specifically, a regulation laying down the procedural conditions governing antitrust actions would have the advantage of creating a level playing field in the EU, and would ensure that all individuals have the same right to compensation no matter in which Member State they decide to bring an action for damages. But the drawback would be that it would not be possible to take into consideration all the divergent legal traditions and cultures and, therefore, there might be a risk that the application of the regulation might not be as effective as desirable. It should thus be carefully considered, which issues indeed require uniform regulation, and cannot be resolved through other, less invasive, measures. Furthermore, the elaboration of a regulation would be a complicated, time-consuming process, since sufficient political will among the Member States would be indispensable. Consequently, it would take years before the effects of the harmonization could be felt.

A new directive would be a more flexible tool in that it would only establish the framework and the objectives that are to be attained, but would leave to the Member States to concretely design the procedural devices. This would enable them to adopt mechanisms that would be in compliance with their legal system and traditions, thus increasing the likelihood of effective application. Nevertheless, sufficient political will for the reform would again be required, so this instrument would also not provide any fast solution to the current under-enforcement of the competition rules.

The choice of the legal instrument for the harmonization is closely linked to the envisaged effect of the harmonization, and to what extent it will be realized at the Union level, as well as what role Member States should play in the implementation process. The more uniformly a particular issue should be harmonized, the more intrusive must the legal instrument chosen be. Nevertheless, binding legislative measures require a competence of the EU to adopt the legislation concerned, and sufficient political will

amongst the Member States to agree on the harmonization, and to implement the principles in practice.

In order to assess the feasibility of a further harmonization of the rules governing antitrust damages actions, the principle of procedural autonomy must be taken into consideration. The procedural autonomy stems from the judgment in *Rewe*, in which the Court of Justice stated that “*in the absence of Community rules on this subject, it is for the domestic legal systems of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law*”.¹⁷³⁷ The Court held that, if necessary, Articles 100-102 EC [now 114-117 TFEU] and Article 235 EC [now 352 TFEU] enabled measures to be taken to remedy differences between the procedural provisions in Member States, if these rules were likely to distort or harm the functioning of the internal market. Moreover, the Court emphasized that only when no harmonizing measures exist, must the rights conferred by EU law be exercised in accordance with the conditions laid down by national rules.¹⁷³⁸

Arguably, accepting that Member States could adopt procedural rules that would render the enforcement of Union rights difficult or even impossible would undermine the supremacy of EU law and, thus, the very essence of the EU legal order. In fact, it also follows from the case law of the Union courts that national procedural rules must be set aside if they do not comply with the principles of equivalence and effectiveness.¹⁷³⁹ Consequently, Member States may determine certain procedural conditions for actions governing rights conferred by EU law as long as there are no Union provisions regarding the issue concerned, and the national rules comply with the requirements of EU law.¹⁷⁴⁰

¹⁷³⁷ Judgment in *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, EU:C:1976:188, paragraph 5.

¹⁷³⁸ *Idem*.

¹⁷³⁹ See e.g. Judgment in *Rewe v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, and Judgment in *Amministrazione delle Finanze dello Stato v San Giorgio*, C-199/82, EU:C:1983:318.

¹⁷⁴⁰ See LESKINEN, C., “*The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions*”, Working Paper IE Law School, WPLSO8-01, 15.1.2008, at p. 8, available at <http://papers.ssrn.com/abstract=1138797>.

Since the “principle of procedural autonomy” may have negative effects both for the effective and uniform application of EU law,¹⁷⁴¹ the Court of Justice has imposed limitations to the application of national procedural rules: the principles of equivalence and effectiveness.¹⁷⁴²

The principle of equivalence signifies that national procedural rules that govern actions based on a Union right may not be less favorable than rules governing similar domestic actions,¹⁷⁴³ i.e. that claims based on Union law must be treated equally to claims based on national law.¹⁷⁴⁴ As regards private enforcement, the enforcement of the EU competition rules may, therefore, not be less favorable than rules governing the private enforcement of national competition rules.¹⁷⁴⁵

The principle of effectiveness, in turn, requires that procedural conditions governing actions based on the direct effect of EU do not render the enforcement of rights conferred by EU law “*virtually impossible or excessively difficult*”.¹⁷⁴⁶ In assessing whether a national procedural provision renders the application of EU law impossible or excessively difficult, each case must be analyzed by reference to the role of that provision in the procedure, its progress, and its special features, viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defense, the principle of legal certainty, and the proper conduct of procedure must, where

¹⁷⁴¹ See JACOBS, F.G., “*Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective*” in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001, Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford – Portland Oregon, 2003, p. 187-232, at p. 215.

¹⁷⁴² See Judgment in *Rewe v Landwirtschaftskammer für das Saarland*, EU:C:1976:188.

¹⁷⁴³ See Judgment in *Rewe v Landwirtschaftskammer für das Saarland*, EU:C:1976:188, paragraph 5.

¹⁷⁴⁴ See LENAERTS, K., ARTS, D. and MASELIS, I., *EU Procedural Law*, Oxford University Press, Oxford, 2014, at p. 118.

¹⁷⁴⁵ See JACOBS, F.G., “*Procedural Aspects of the Effective Private Enforcement of EC Competition Rules: A Community Perspective*” in EHLERMANN, C.-D. and ATANASIU, I. (eds.), *European Competition Policy Annual: 2001, Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford – Portland Oregon, 2003, p. 187-232p. 217. For instance, in *Manfredi* the ECJ referred to the principle of equivalence when it stated that it must be possible to award particular damages, such as exemplary or punitive damages, pursuant to actions founded on EU competition rules, if such damages may be awarded pursuant to similar actions founded on national law. See Judgment in *Manfredi*, EU:C:2006:46, paragraph 93.

¹⁷⁴⁶ Judgment in *Amministrazione delle Finanze dello Stato v San Giorgio*, EU:C:1983:318, paragraph 7.

appropriate, be taken into consideration.¹⁷⁴⁷ If the national provision impairs the effectiveness of EU law, the national court deciding on an action based on a right conferred by EU law, must refuse to apply the provision in question.¹⁷⁴⁸

Furthermore, under Article 4(3) TEU, Member States have a duty to cooperate, and must collaborate actively by adopting all general or particular measures to ensure the implementation of EU law. Moreover, Member States are obliged to abstain from all measures that could jeopardize the attainment of the objectives of the Treaties.

In the field of private antitrust enforcement, the duty of sincere cooperation under Article 4(3) TEU would require Member States' national courts to award damages for infringements of the EU competition rules, since national courts have an obligation to give effective protection to Union rights (principle of effectiveness). As the right to damages is a right conferred to individuals by EU law, it has primacy over national law. In resolving antitrust damages actions based on EU law, national courts must comply with the principles of equivalence and effectiveness by ensuring that those who have suffered harm from an infringement of Article 101 or 102 TFEU obtain adequate and sufficient compensation for their loss. Providing for sufficient damages also facilitates the Union's task to ensure a working competition in the internal market. However, if the damages awarded are not sufficient, or antitrust damages actions are subject to unduly strict conditions, this might impede the victim of antitrust violations from seeking compensation and, hence, the obligation of sincere cooperation could not be considered fulfilled.¹⁷⁴⁹

Furthermore, the duty of sincere cooperation does not only apply to national courts, but to national legislators as well. Consequently, the procedural rules governing actions for antitrust damages should be framed in such a manner that it is possible for those upon whom the EU competition rules have conferred rights to enforce those rights in practice.

¹⁷⁴⁷ Judgment in *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten*, C-430/93 and C-431/93, EU:C:1995:441, paragraph 19.

¹⁷⁴⁸ Judgment in *Amministrazione delle Finanze dello Stato v San Giorgio*, EU:C:1983:318, paragraphs 21-22.

¹⁷⁴⁹ See LESKINEN, C., "The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions", Working Paper IE Law School, WPLSO8-01, 15.1.2008, at p. 11 available at <http://papers.ssrn.com/abstract=1138797>.

Nevertheless, even if the national legislator had failed to enact efficient and adequate rules, national courts must, under the duty of sincere cooperation, and in compliance with the principles of equivalence and effectiveness, set aside those rules if they impede them from awarding damages for EU antitrust infringements.¹⁷⁵⁰

7.4.3. Sector-specific Harmonization v. Harmonization of Civil Procedural Rules

It is possible to envisage several options for a more comprehensive harmonization of the national procedural rules governing antitrust damages actions depending on what other reforms are planned in other fields of law. The Directive on Antitrust Damages is based on a sector-specific harmonization which has considered the particularities of competition law, such as the information asymmetry which often exist between the infringer and the injured parties. The rules regarding access to evidence, the binding effect of infringement decisions of a NCA, etc. are specific rules designed for facilitating the bringing of antitrust damages actions.

However, regarding collective redress mechanisms, the Commission has opted for a horizontal approach since its recommendations apply to victims of mass harm situations in general, and not only antitrust violations. Nevertheless, it will not result in a harmonization since it is a soft-law instrument, but at most it might lead to voluntary approximation between the national legislations if the Member States choose to follow the recommendations. Since the problems which consumers face in antitrust cases are often similar as in the fields of product liability and unfair trading, a common approach would be justified, and would create large synergies.

The Commission has therefore chosen to provide for general collective redress for victims in mass harm situations in combination with specific redress possibilities in antitrust damages cases. This could also serve as a starting point for the modifications that are suggested in this thesis. Regarding collective actions, there is indeed a case for a general EU collective action for violations of rights granted under EU law based on a horizontal harmonization. However, if the measures proposed are not likely to achieve sufficient political support in order to be adopted, a sector-specific collective redress mechanism could first be introduced for antitrust damages and injunction cases and,

¹⁷⁵⁰ *Idem.*

when some experience has been gathered from the functioning of the redress mechanism, it could possibly be extended to other fields in which rights granted under EU law have been violated in mass harm situations.

As to the cost rules, given the controversial nature of contingency fees and third-party funding in a number of Member States,¹⁷⁵¹ binding rules are even more likely to meet resistance from the Member States, and the reform should, at least first, be limited to the field of competition law by providing antitrust specific cost rules.

7.4.4. Legal Basis for a Harmonization at Union Level

The introduction of a binding Union collective action requires the existence of a legal basis for adopting such an action, since the EU only has competences, which have been conferred upon it by the Member States.¹⁷⁵² It would depend on the ultimate aim of the action, i.e. whether it is designed to be a horizontal mechanism available to all individuals whose right granted under EU law have been violated in a mass harm situation in order to improve consumer redress in general, or whether it will form part of a further sector-specific harmonization of national procedural rules aiming to enhance the effective and uniform application of the EU antitrust rules.

Moreover, in areas of shared competences, the Union may only take action if action at the Union level is necessary, and the objectives cannot be sufficiently achieved by the Member States, but can be better achieved by the Union.¹⁷⁵³ This requirement is met, since there is a need for an EU-wide collective action for damages based on a mass harm situation in which rights granted under Union law have been infringed as especially consumers might not be able to enforce their claims effectively in particular in cross-border cases. In addition, the measure must comply with the principle of proportionality, i.e. it should not go beyond what is necessary to achieve the objectives of the Treaties.¹⁷⁵⁴

¹⁷⁵¹ See e.g. Section 3.4 on France.

¹⁷⁵² This so-called principle of conferral is laid down in Article 5(1) TEU.

¹⁷⁵³ This principle of subsidiarity is established in Article 5(3) TEU.

¹⁷⁵⁴ See Article 5(4) TEU.

An EU collective action could be adopted under Article 81(2)(f) TFEU, which allows the elimination of obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedures applicable in the Member States when this is necessary in order to ensure the proper functioning of the internal market. This legal basis would be justified by the necessity to ensure the effective enforcement of the substantive rights granted to individuals and companies under EU law, and the same protection of those rights across the EU. This would, in turn, avoid competitive advantages for companies established in Member States where it is difficult for consumers to enforce their rights. The introduction of an EU collective action would also enhance access to justice in cross-border situations since, currently, it is impossible in some Member States for consumer organizations to bring collective actions on behalf of consumers who are non-nationals.¹⁷⁵⁵ Moreover, the importance of the right to effective judicial protection in the form of an effective remedy has been highlighted by the Court of Justice.¹⁷⁵⁶ In short, the introduction of an EU collective action would arguably meet both requirements for the use of Article 81 TFEU: it would be “particularly necessary for the proper functioning of the internal market” and it would improve access to justice.

Alternatively, a sector-specific collective action could be provided for antitrust damages cases, which could later be expanded to other fields in which mass harm has been caused. This option could be appropriate in case it is difficult to find sufficient support for a binding horizontal EU collective action, and if there are doubts about the need for such an action in other fields. Regarding antitrust damages actions, the need for an efficient collective redress mechanism has already been demonstrated, since currently consumers seldom obtain compensation for the harm that they have suffered, and the few collective antitrust damages claims brought to date have failed or had very limited success. The legal basis for a directive introducing a collective antitrust damages action would arguably be the same as for the Directive on Antitrust Damages Actions (i.e. it could be based on Articles 103 and 114 TFEU), since the main objective to ensure the efficient and uniform application of the EU competition rules and the proper functioning of the internal market.

¹⁷⁵⁵ For instance, in France, only consumers associations which represent consumers at a national level may bring a representative action on behalf of consumers who have been injured as a result of the actions of the same professional. See Article L.422-1 of the Consumer Code.

¹⁷⁵⁶ Judgment in *Otis and Others*, EU:C:2012:684.

The modifications to the cost rules required in order to make the EU-wide collective action feasible, should be included in the same instrument which provides for such an action. However, if sufficient support cannot be found for modifying the costs rules on a horizontal basis, the possibility of amending the costs rules merely in the field of antitrust damages actions should be considered. The legal basis would arguably be Articles 103 and 114 TFEU.¹⁷⁵⁷

It is argued that the need to ensure that individuals can enforce their rights stemming from the Treaty in the same manner in any Member State would justify the adoption of harmonizing measures by the Council on the basis of Article 103 TFEU.¹⁷⁵⁸ Admittedly, it would require an extensive interpretation of the wording of Article 103 TFEU, but it would be justified by the need for an efficient and uniform application of the EU competition rules throughout the EU, and the need to ensure the direct effect of Articles 101 and 102 TFEU.

7.4.5. Choice of Legal Instrument

There is a need for an EU-wide collective action for damages based on a mass harm situation in which rights granted under Union law have been infringed. A further directive would appear as the most appropriate legal instrument by allowing to respect the legal traditions and cultural differences of the Member States and to solve constitutional problems in the most suitable manner while, at the same time, providing for sufficient uniformity.

The drawback of choosing a directive for introducing an EU-wide collective action is that it has to be implemented into the national legal systems before it becomes binding. In the case of the recent Directive, the Member States will have two years from the entry into force of the directive,¹⁷⁵⁹ but they have certain discretion as to the form and means they choose in order to implement the provisions of the directive. This means

¹⁷⁵⁷ It should be noted that Directive 2004/48/EC on the enforcement of IPRs, which provides for a possibility of derogating from the “loser pays” principle in certain situations was adopted on the basis of Article 114 TFEU.

¹⁷⁵⁸ See LESKINEN, C., “*The competence of the European Union to adopt measures harmonizing the procedural rules governing EC antitrust damages actions*”, Working Paper IE Law School, WPLSO8-01, at p. 17-18, available at: <http://papers.ssrn.com/abstract=1138797>.

¹⁷⁵⁹ Article 21 of the Directive on Antitrust Damages Actions.

that some divergences between Member States will still exist even after the measures have been implemented at national level. This is especially the case with those provisions which do not contain very specific obligations, but refer, for instance, to the limits imposed by the principles of equivalence and effectiveness. It would therefore be necessary to find a wording which is specific enough, but which also allows for taking into account the differences in the national legal systems.

A regulation would have the benefit of establishing directly applicable uniform rules, but it would be more difficult to take into consideration divergent legal traditions and cultures. The elaboration and negotiation of a regulation would also be a complicated, time-consuming process, and it would be more challenging to achieve sufficient political will among the Member States. Given that the possibility of also providing for opt-out collective actions at least for mass-claims of low value would be necessary in order for the collective redress mechanism to be effective, it is highly unlikely that a regulation could be agreed on.

But whatever solution will finally be chosen, it should be possible to apply it effectively in practice. For certain cost rules, such as contingency fees, the directive might therefore not be a realistic option but, as a first measure, recommendations could be issued. However, a binding provision should be adopted at least regarding the possibility for derogation from the “loser pays” principle in order to increase access to justice by reducing the costs litigation.¹⁷⁶⁰

7.4.6. Feasibility of the Proposed Measures

The feasibility of introducing the changes outlined above has to be assessed against the legal and cultural background in the EU. The EU has made a different policy choice than the United States regarding who should enforce competition rules since public enforcement represents most of the overall antitrust enforcement, whereas the emphasis in the United States is on private antitrust enforcement. Favorable procedural rules that foster private enforcement, such as those in the US, do not generally exist in the EU. The challenge is that although the benefits of optimal deterrence would be felt at the EU level, Member States would bear the social costs. Furthermore, the required additional

¹⁷⁶⁰ See LESKINEN, C., “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121, at p. 121.

changes in procedural and remedial law would also have effects in other types of civil litigation, and these costs could be felt as excessive.¹⁷⁶¹ This is likely to explain why the Directive on Antitrust Damages Actions is a bleak version of the reforms initially suggested. More significant changes to the Member States' national procedural rules might therefore meet resistance.

Since national procedural rules are very divergent in the EU, it is also difficult to reach consensus about how to design common procedural rules. Moreover, the EU differs from the United States in that it does not have a litigation culture to the same extent, but the barrier to initiate legal proceedings is much higher. In fact, there is a common, but unfounded, fear in Europe that class actions lead to abuses, with lawyers obtaining large fees at the cost of class members.¹⁷⁶²

But since various Member States have introduced or are thinking of introducing more effective collective actions,¹⁷⁶³ it is understood that a sufficient political will exists to at least consider the introduction of a binding collective redress mechanism as long as it is compatible with the national constitutional rules. Furthermore, as to the modification of the “loser pays” rule in certain limited situations necessitated by fairness considerations, this already exists with regard to actions to enforce intellectual property rights, and should thus be feasible also in the field of competition law.

7.5. Implications for Public Enforcement of the EU Competition Rules

The harmonization and approximation of certain procedural rules governing antitrust damages actions and the introduction of collective actions for antitrust damages followed by an expected increase in private enforcement also have implications for the public enforcement of the EU competition rules. Some of them could be positive, while there is also a risk of negative effects, unless certain safeguards are put in place.

¹⁷⁶¹ See BUXBAUM, H.L., “Private Enforcement of Competition Law in the United States – of Optimal Deterrence and Social Costs in Private Enforcement of EC Competition Law”, in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 44-60, at p. 57-58.

¹⁷⁶² See SCHNELL, G., “Class Action Madness in Europe – a Call for a More Balanced Debate”, *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 617.

¹⁷⁶³ See Section 2.2.

A positive effect would be increased compliance with the competition rules, since the financial risk of paying damages would contribute to deter undertakings from breaching the competition rules. On the other hand, the risk of additional punishment in the form of private damages could also discourage cartel members from seeking leniency, since it is not possible to grant leniency from private damages claims. As leniency programs are an important tool for detecting and putting an end to harmful cartels, it would be necessary to ensure that increased private enforcement does not make leniency programs less attractive, since otherwise the risk is that the overall enforcement of competition rules would diminish instead of increase.

As an undertaking applying for leniency will normally provide the competition authorities with documents incriminating itself¹⁷⁶⁴ its participation in the infringement is usually described in more detail than the participation of other cartel members.¹⁷⁶⁵ There is hence a risk that if private litigants obtain access to these documents through discovery, they will seek damages from the leniency applicants since it is easiest to prove its participation in the infringement.¹⁷⁶⁶ Therefore, to the extent that it is necessary to guarantee the effectiveness of leniency programs, it is also necessary to ensure the confidentiality of the declarations made by leniency applicants to the competition authorities, so that they could not be used for other aims than the public enforcement of competition rules.¹⁷⁶⁷ But as has been submitted in Chapter Four, there should always be a balance between public and private enforcement, which are complementary goals of EU competition law, and public enforcement should not automatically be given priority in such cases, but a case-by-case analysis must be conducted. This is essentially what the ECJ has suggested in *Pfleiderer* where it held that national courts deciding requests for access to leniency documents should weigh

¹⁷⁶⁴ See BÖGE, U., “*Leniency Programs and the Private Enforcement of European Competition Law*” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 217-226, at p. 221.

¹⁷⁶⁵ See SANDHU, J.S., “The European Commission’s Leniency Policy: A Success?”, *E.C.L.R.*, Volume 28, Issue 3, 2007, p. 148-157, p. 155.

¹⁷⁶⁶ See BÖGE, U., “*Leniency Programs and the Private Enforcement of European Competition Law*” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 217-226, at p. 221.

¹⁷⁶⁷ See CONSEIL DE LA CONCURRENCE, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 17.

the usefulness of leniency programs for detecting cartels against the contribution of damages actions for the maintenance of effective competition.¹⁷⁶⁸

In contrast, to maintain the attractiveness of its amnesty program, the U.S. approach since the Antitrust Criminal Penalty Enactment and Reform Act 2004 is that damages for immunity applicants who cooperate with the plaintiffs in private damages actions can be de-trebled.¹⁷⁶⁹ In the EU, it would in general not be possible to reduce leniency applicants' civil liability, since treble damages are not available, and the damages provided in European legal systems must ensure full compensation for the actual loss. Consequently, if the leniency applicant's liability is reduced, the victim might not obtain full compensation, which would be contrary to European legal understanding.

Furthermore, increased private enforcement could also increase the number of parallel actions, i.e. where the same anti-competitive conduct is simultaneously subject for both public and private enforcement. There are at least two risks in this context. First, there is a risk that the proceedings result in different outcomes. But this risk is reduced thanks to the mechanisms provided for in Regulation 1/2003, which foresee cooperation between the Commission and the national courts.¹⁷⁷⁰ Moreover, the national courts must not take a decision conflicting with a Commission decision, but should suspend the proceeding if there is a risk of such a conflict.¹⁷⁷¹ However, more coordination would be needed when a particular conduct is subject to public enforcement in one Member State, and antitrust damages proceedings in the courts of another Member State.

Second, if the private action is initiated before the public enforcers have had a possibility to conduct an inspection in the premises of the alleged infringers, the cartel members might destroy evidence before the competition authorities have a possibility to

¹⁷⁶⁸ Judgment in *Pfleiderer*, EU:C:2011:389, paragraph 30.

¹⁷⁶⁹ See YSEWYN, J., "Private enforcement of competition law in the EU: trials and tribulations", *International Law Practicum*, 19-Spring, 2006, p. 14-19.

¹⁷⁷⁰ See Articles 15 and 16 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L* 1, 4.1.2003, p. 1-25.

¹⁷⁷¹ See Judgment in *Delimitis*, EU:C:1991:91, paragraph 47, and Judgment in *Masterfoods*, EU:C:2000:689, paragraphs 56-57.

secure the evidence. This would result in under-enforcement of the competition rules¹⁷⁷² because private damages in the EU are not likely to outweigh the fines imposed by competition authorities and, consequently, the cartel members would not be deprived of all the financial gains that they have made by breaching the competition rules.

However, as most actions are, and probably will be at least in the near future, follow-on actions, these risks will probably not materialize very often. It is therefore important to ensure that private enforcement does not make leniency programs less attractive with diminished public enforcement as a consequence. In other words, undertakings should not perceive that they would benefit economically if they did not participate in leniency programs.¹⁷⁷³ A possible solution would be to consider the introduction of double damages for hard-core cartels and follow the U.S. approach of only imposing a successful immunity applicant an obligation to compensate actual damages. In this manner, undertakings cooperating with the competition authorities in uncovering cartels would obtain a 50% reduction regarding the civil liability in damages.

7.6. Conclusions

Some of the measures included in the Directive on Antitrust Damages Actions would require adjustments in order to make private enforcement more effective. Most importantly, efficient collective redress mechanisms would also be required, and should be introduced by a new directive. However, the question of what types of collective actions could be introduced in the EU is closely linked to other measures aiming at fostering private enforcement of the EU competition rules, and the feasibility of adopting binding measures. Arguably, courts should be given discretion to decide on a case-by-case basis whether a particular action should be brought based on the “opt-in” or “opt-out” principle. These forms of collective actions should ensure a minimum level of effective access to justice, but Member States could decide to go beyond these types of actions conforming to their legal traditions.

¹⁷⁷² See Conseil de la Concurrence, “Avis du 21 septembre 2006 relatif à l’introduction de l’action de groupe en matière de pratiques anticoncurrentielles”, at p. 20.

¹⁷⁷³ See BÖGE, U., “*Leniency Programs and the Private Enforcement of European Competition Law*” in BASEDOW, J. (ed.), *Private Enforcement of EC Competition Law*, Kluwer Law International, Alphen aan den Rijn, 2007, p. 217-226, at p. 220-222.

Moreover, the cost rules also require some modification in order to ensure the funding of collective actions, as the effectiveness of such actions would otherwise be significantly reduced. National courts should be empowered to derogate from the “loser pays” principle if this is required of fairness reasons in order to incentivize meritorious antitrust damages actions. In addition, the use of contingency fees or other alternative means of funding should at least be encouraged. Preferably, if sufficient support for approximation could be found, alternative funding options should be made available.

Apart from the expected implications for public enforcement outlined in the section above, the harmonization of some national procedural rules and the introduction of collective redress mechanisms should not only enhance private enforcement, and especially provide a more effective remedy for consumers, but is likely to result in a rapprochement of procedural rules in general. The establishment of common Union procedural rules in yet another field is also another step away from procedural autonomy. Nevertheless, this is justified since substantive EU rights should be efficiently and uniformly enforced in the EU regardless of in which Member State the injured party brings the action. Since these rights cannot be effectively enforced at national level, common procedural rules are the only way to bring about a general change.

8. CONCLUSIONS

8.1. Summary of the Main Findings

8.1.1. Private Enforcement of the EU Antitrust Rules at EU level

In the EU, the policy choice for the enforcement of the EU antitrust rules has been public enforcement by the national competition authorities and, until the modernization of the enforcement of Articles 101 and 102 TFEU in May 2004, above all by the European Commission. The role of private enforcement of the EU antitrust rules, in particular through damages claims, has therefore played a much less significant role despite that the Court of Justice already held in *BRT v SABAM* that Articles 101 and 102 TFEU produce direct effects in relations between individuals and “*create direct rights in respect of the individuals concerned which the national courts must safeguard*”.¹⁷⁷⁴ Until the modernization of the EU antitrust rules, this could partly be explained by the Commission’s previous monopoly to grant an individual exemption for agreements infringing Article 101(1) TFEU but satisfying the conditions of Article 101(3) TFEU, which tended to paralyze private actions pending before the national court until the Commission had dealt with the notification for exemption.¹⁷⁷⁵ Furthermore, the Treaty does not contain any explicit provision on liability in damages for infringements of Article 101 and 102 TFEU. Instead, this right has been deduced from Article 4(3) TEU and the principle of effectiveness,¹⁷⁷⁶ and later explicitly recognized by the Court of Justice in its seminal ruling *Courage*.¹⁷⁷⁷

In *Courage*, the Court of Justice held that any individual could rely on a breach of Article 101(1) TFEU before the national courts, and that this right extended even to a party to a contract that is liable to restrict or distort competition.¹⁷⁷⁸ Moreover, the right to seek damages is independent of whether or not the Commission is acting on a possible complaint. The Court thus expressly extended the principles giving rise to a remedy against Member States for breaches of EU law to liability for breaches of the

¹⁷⁷⁴ See Judgment in *BRT v SABAM*, EU:C:1974:25, paragraph 16.

¹⁷⁷⁵ See KOMNINOS, A.P., *EC Private Antitrust Enforcement. Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford and Portland, Oregon, 2008, at p. 29.

¹⁷⁷⁶ See Commission Staff Working Paper, SEC (2005) 1732, Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules, COM (2005) 672 final, 19.12.2005, at p. 9.

¹⁷⁷⁷ See Judgment in *Courage*, EU:C:2001:465, paragraph 26.

¹⁷⁷⁸ See Judgment in *Courage*, EU:C:2001:465, paragraph 24.

EU antitrust rules by individuals in that it recognized an EU right to claim damages for antitrust violations, arguing that this right is necessary in order to ensure the full effectiveness of the antitrust rules. In other words, it created individual liability for breaches of the EU antitrust rules. In addition, it held that national courts are obliged to give effect to the EU right to damages regardless of national provisions.¹⁷⁷⁹

The fact that national courts are entrusted the enforcement of Union rights was already confirmed in *van Gend & Loos*, in which the Court of Justice established the complementary nature of public and private enforcement of rights derived from EU law, and that individuals are also entitled to participate in the vigilance of the compliance with Union obligations.¹⁷⁸⁰ But, the vigilance of individuals of the compliance with the EU antitrust rules by enforcing their Union right to damages for antitrust violations has not worked very well in practice. The under-enforcement of antitrust rules through private actions in the EU was revealed by the Ashurst Study, which found that private enforcement in the EU showed an “*astonishing diversity and total underdevelopment*”.¹⁷⁸¹ Although, in light of more recent research, the numbers of damages actions found by the Ashurst Study may be questioned in particular with regard to Germany, Spain, France United Kingdom, Netherlands, Belgium, Italy, Portugal and Sweden,¹⁷⁸² the Study still serves to demonstrate the overall insignificant level of private enforcement in the EU approximately a decade ago.

Even though private damages actions are today brought more frequently, there are still comparatively few actions in the EU. The Commission has estimated that between 2006 and 2012, only 52 actions for damages were brought as follow-on actions based on Commission Decisions. Moreover, these claims were only brought in seven Member States, and most of them were brought in Germany, the United Kingdom and

¹⁷⁷⁹ See JONES, C. A., *Private Enforcement of Antitrust in the EU, UK and the US*, Oxford University Press, New York, 1999, at p. 74. It should be noted that EU law only provides a substantive right to damages for infringement of Articles 101 and 102 TFEU, whereas the rules governing the bringing of damages actions are determined by the Member States.

¹⁷⁸⁰ See Judgment in *van Gend & Loos*, EU:C:1963:1.

¹⁷⁸¹ See Ashurst Study, at p. 1.

¹⁷⁸² See AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012, Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>. However, this research project noted that in many of the cases undertakings have used the competition rules as defenses to breach of contract claims, so independent damages claims would probably still be comparatively few.

Netherlands. Conversely, in the rest of the Member States there appear to have been no follow-on actions based on a Commission Decision during the period in question.¹⁷⁸³

This indicates that damages actions are not working properly in a large majority of the Member States, and that private enforcement in the EU is still very divergent despite the existence of a Union right to damages.

Furthermore, it is believed that more cases are settled out of court.¹⁷⁸⁴ But claimants might be in a weaker position than the defendant, thus having little bargaining power, which could result in disadvantageous settlements for them, unless they have access to an effective judicial remedy which can incentivize the defendant to settle. In addition, when antitrust damages actions are brought in courts, the competition law rules are usually used as a defense by companies in commercial contract disputes,¹⁷⁸⁵ and it appears that in many cases other remedies than damages are sought, or the damages claims are unsuccessful.¹⁷⁸⁶

Most notably, damages claims are hardly brought by consumers, and the few representative actions that have been brought on their behalf to date have had very limited success, failing to compensate the majority of the harm suffered by the injured parties.¹⁷⁸⁷ This is concerning since, ultimately, the victims of antitrust violations are usually consumers, as purchasers in the previous levels in the distribution chain can pass on the overcharge that they have paid to the next level in the distribution chain, but consumers must bear the whole overcharge passed on to them.

¹⁷⁸³ See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 19.

¹⁷⁸⁴ For the situation in the UK, see RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 42.

¹⁷⁸⁵ See AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012, Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>.

¹⁷⁸⁶ See AHRC Project on Comparative Private Enforcement and Collective Redress, LSE, September 15th, Conference Rapporteur Presentations: Matrix of competition private enforcement cases from the 24 rapporteurs who presented at the conference, available at <http://www.clcpecreu.co.uk/pdf/LSEConferencePresentationNotes.pdf>.

¹⁷⁸⁷ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07 and <http://www.cartelmobile.org/>.

This under-enforcement of competition rules, especially by consumers, is all the more alarming in the light of the modernization of the EU competition rules, since the aim of the reform was, *inter alia*, to encourage private enforcement actions by giving national courts the right to apply Articles 101 and 102 TFEU in full. The attempt to increase private enforcement could, in fact, be considered as a parallel to the creation of private attorneys general in the U.S. under Sec. 4 of the Clayton Act.¹⁷⁸⁸

8.1.2. Obstacles to Private Enforcement in the Member States

The reason for the limited private enforcement can be explained by the fact that antitrust damages actions are currently governed by national procedural rules. Thus, in practice, the possibilities of bringing antitrust damages actions vary from Member State to Member State.¹⁷⁸⁹ The analysis of private enforcement in the United Kingdom, Germany, France, Spain, Sweden and Finland conducted in this thesis shows that injured parties still face a number of obstacles to bringing antitrust damages action in the EU. Even in Member States where antitrust actions are brought fairly frequently, such as the United Kingdom and Germany, damages are seldom awarded in hardcore cartel cases.¹⁷⁹⁰ In particular consumers do not seem to have recourse to any effective remedy in the EU, since there have been almost no small value consumer mass claims for damages for antitrust violations.¹⁷⁹¹

It is particularly striking that damages actions are not often brought by victims of hardcore cartels. It is understandable that this type of damages claims are not brought as stand-alone actions as it is already difficult for competition authorities, which have wide

¹⁷⁸⁸ Sec. 4 of the Clayton Act provides: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee [...]”.

¹⁷⁸⁹ For instance, the limitation periods for follow-on actions for damages vary from six months to five years. See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 16.

¹⁷⁹⁰ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 43, and PEYER, S., AHRC Project, “*Germany. Comparative Private Enforcement & Consumer Redress in the EU*”, at p. 23.

¹⁷⁹¹ See AHRC Research Project on EU Competition Law: “*Comparative Private Enforcement and Collective Redress in the EU 1999-2012*” Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>.

powers of inspection at their disposal, to detect these secret agreements. Therefore, it is virtually impossible for victims of cartel agreements to adduce sufficient evidence to prove the infringement, and the damage that they have suffered as a result of it. But, one would imagine that follow-on actions for damages would be more frequent, especially since the claimant could refer to the Commission Decision in order to establish the existence of an infringement of the EU competition rules. However, one explanation for the limited number of follow-on damages actions could be that the infringement decision does not necessarily demonstrate that the infringement has actually caused harm.¹⁷⁹²

Another explanation is that many potential actions for damages are settled. But the most plausible explanation is that too many obstacles to bringing antitrust damages actions currently exist in the Member States. High legal costs and the uncertainty of the outcome of the action serve as disincentives to bring damages claims. The burden of proof is high, requiring claimants not only to establish the infringement of the competition rules, and demonstrate the causal relationship between the infringement and the harm that they have suffered as a result of it, but also to quantify the exact amount of damage suffered. As access to evidence is, in most Member States, limited,¹⁷⁹³ most claimants are probably deterred from initiating proceedings due to the length and costs of proceedings, since they may lack both financial resources and the expertise required to bring an antitrust damages claim.

For consumers, in particular those who have comparatively small claims in comparison to the potential high costs of damages claims, the task is virtually impossible, and stand-alone actions are unthinkable. But also small and medium-sized undertakings might face the same hurdles, especially in situations where they are indirect purchasers, and would be required to show the exact amount of the overcharge that has been passed on to them. Consequently, for consumers and SMEs it would be important to be able to bring a collective action together with other victims in order to reduce the costs and risks of the action, and to actually have an incentive to bring a claim.

¹⁷⁹² See DANOVA, M. and BECKER, F., “*The Way Forward: A Strong Case for Reform at EU Level*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 407-420, at p. 416-417.

¹⁷⁹³ The United Kingdom and Ireland have more generous discovery rules than civil law jurisdictions.

The state-of-play of private enforcement demonstrates that measures are required in order to encourage victims of antitrust violations to bring damages claims, and in order to ensure the overall compliance with the EU competition rules. As consumers are likely to ultimately suffer most of the negative effects of antitrust violations in the form of increased prices, decreased quality and choice of products etc., especially their possibilities of seeking damages should be enhanced. Arguably, collective actions could be the appropriate remedy.

The necessity to introduce some form of effective collective action device in the EU is particularly great with regard to consumers that have suffered a loss as a result of higher prices. Currently, the costs and uncertain outcome of litigation discourage them from claiming compensation, especially when the individual losses suffered are fairly low. On the other hand, the aggregate damage of all consumers and the financial gains of the cartel members could be significant. Therefore, only if consumers could join their forces in a collective action, would there be a realistic possibility in these cases for a great number of victims obtaining full compensation for their loss.

The possibility to decide numerous small claims, the aggregate value of which could be considerable, in one proceeding would thus ensure access to justice. Similarly, the courts would not be obligated to decide numerous similar issues over and over, which would alleviate the burden on courts in general, thus resulting in a better administration of justice. Collective actions could also contribute to reduce the difficulties associated with indirect purchaser cases if the claims of indirect purchasers could be consolidated with those of direct purchasers, and then a first proceeding could determine the total overcharge that the price-fixing has resulted in, while a second proceeding would allocate the damages between the various purchasers in the distribution chain.¹⁷⁹⁴ This would in turn eliminate multiple recoveries.

In general, collective actions would mean reduced costs not only for claimants, but also for defendants. They would also foster increased legal certainty in that possibly all claims are resolved once. Further, they would reduce asymmetries between parties,

¹⁷⁹⁴ See BAKER, D.I., "The Future of Private right of Action in Antitrust", *Loyola Consumer Law Review*, 16, 2004, p. 379-408, at p. 394-396.

particularly in situations where many low-value claims exist and, consequently, result in enhanced deterrence.

However, there are certain risks related to collective actions. Unmeritorious claims could be brought, since lower legal costs for litigation would facilitate initiating proceedings. Defendants might also be inclined to settle in order to avoid court proceedings, even when their conduct did not breach the competition rules. But these risks could be significantly reduced by providing for appropriate safeguards.

Nevertheless, the collective actions available in the Member States today do not, in general, provide sufficient and effective redress. Of the six Member States analyzed in this thesis, only the United Kingdom¹⁷⁹⁵ and France¹⁷⁹⁶ expressly provide for representative actions/collective actions for damages based on a breach of the national or the EU competition rules. However, currently these actions can only be brought as follow-on actions after a decision by the European Commission or the national competition authorities establishing the infringement in question.¹⁷⁹⁷ Furthermore, these actions are limited to consumers, even though soon SMEs will also be able to bring collective actions in the United Kingdom.¹⁷⁹⁸ It is also important to note that the French collective action may only be brought by French consumer associations,¹⁷⁹⁹ which impedes other consumer associations from bring a collective action on behalf of consumers from different Member States in France.

The situation in Germany is even more unsatisfactory, since collective actions are only possible for injunctions,¹⁸⁰⁰ or to order the infringers to transfer their illegal proceeds to the Treasury. Damages claims may thus not be brought under such actions.¹⁸⁰¹ The

¹⁷⁹⁵ Section 47A of the Competition Act 1998.

¹⁷⁹⁶ Articles L. 423-1 and L. 423-17 of the Consumer Act.

¹⁷⁹⁷ But the envisaged new collective action in the United Kingdom can also be brought as a stand-alone collective action.

¹⁷⁹⁸ See DEPARTMENT FOR BUSINESS INNOVATION & SKILLS, “*Private actions in competition law: a consultation for options on reform – government response*”, January 2013, at p. 31.

¹⁷⁹⁹ Articles L. 423-1 of the Consumer Act.

¹⁸⁰⁰ Section 33(2) of the Act Against Restraints of Competition.

¹⁸⁰¹ Section 34a of the Act Against Restraints of Competition.

Finnish collective action is also comparatively limited, since it can only be brought by the Consumer Ombudsman for a group which can be determined in advance.¹⁸⁰²

In Spain, only consumer and user associations could bring collective actions for damages caused by antitrust violations, while companies lack this possibility. If the members of the affected group are identified or are easily identifiable, also the affected group can bring collective actions for damages.¹⁸⁰³ However, any award is made with respect to each individual claimant, and not the whole group, so each claimant must apply to the court in order to be recognized as a member of the group, and for individual damages to be quantified.¹⁸⁰⁴ If the claim is very small, the claimant might not join the action because it is often difficult to calculate the exact amount of the damage that he has suffered. In addition, the collective action is only available to consumers, which makes it difficult especially for SMEs to enforce their rights if they have been victims of an antitrust violation.

In contrast, the Swedish private group action was at the time of its adoption considered as a potentially extensive collective action,¹⁸⁰⁵ although it is based on an “opt-in” mechanism. The private group action can either be brought by a natural person or a legal person on behalf of the affected group.¹⁸⁰⁶ Only the group claimant becomes a party to the proceedings and, as a general rule, the passive group members do not have any obligation to pay legal costs in case the defendant is successful.¹⁸⁰⁷ What makes this type of action attractive, at least in theory, is that it is possible to use a modified version of contingency fees, a so-called risk-agreement,¹⁸⁰⁸ to bring the action. However, so far no such actions have been brought in order to claim compensation for antitrust

¹⁸⁰² Section 1 of the Act on Class Actions (444/2007).

¹⁸⁰³ Article 11 of the Civil Procedure Law 1/2000.

¹⁸⁰⁴ See National Report on Spain prepared for the Ashurst Study on the conditions of claims for damages in case of infringement of EC competition rules, at p. 7.

¹⁸⁰⁵ See MICKLITZ, H.-W., and STADLER, A., “The Development of Collective Legal Actions in Europe, Especially in German Civil Procedure”, *EBLR*, Vol. 17, Issue 5, 2006, 1473-1503, at p. 1493-1494.

¹⁸⁰⁶ Sections 1 and 4 of the Group Proceedings Act (2002:599).

¹⁸⁰⁷ Section 33 of the Group Proceedings Act (2002:599).

¹⁸⁰⁸ I.e. an increase in the normal remuneration to the lawyer if the action is successful.

violations,¹⁸⁰⁹ so this type of group action based on the opt-in model does not seem to be the answer to enhancing consumer damages claims.

The experience from the six jurisdictions demonstrates that the current situation in the EU regarding collective actions is fairly unsatisfactory. In practice, this potentially only truly effective redress mechanism for consumers harmed by an antitrust violation is not generally a worthwhile alternative, since the existing collective actions have many flaws. In those jurisdictions where such actions are available, they are seldom brought, and their success is very limited. Due to the opt-in model, in many cases the group of claimants tends to be too small for the action to pay off, and also leads to administrative complexity and high costs.

Moreover, there are also other reasons explaining why consumers do not often bring antitrust damages actions. Consumers are not necessarily aware that they have been victims of a cartel, because cartels are usually secret, and detecting them is demanding even for public enforcers of competition rules despite their wide powers of investigation. Since access to evidence for private litigants is limited, and the burden of proof is high, proving the existence of an anti-competitive conduct is challenging. Furthermore, the risk of losing, associated with the obligation to pay the costs of litigation of the other party, serve as disincentives for claimants with small damages claims to initiate proceedings. The “loser pays” rule applies in all jurisdictions, although some courts (e.g. the CAT) have more discretion in deciding on the allocation of the costs of the proceedings. More flexible cost rules are also available for certain types of claims.¹⁸¹⁰ There are also still a number of limitations on the use of contingency fees, although increasingly more Member States seem to be willing to allow them in certain cases.

Coupled with limited possibilities of ordering disclosure of documents/information in the possession of the other party or third parties, the only realistic possibility of bringing an antitrust damages action would often be a follow-on action. Again, consumers would

¹⁸⁰⁹ See HENRIKSSON, L., AHRC Project, “*Private Enforcement and Consumer Redress in Sweden 1999-2012*”, at p. 7.

¹⁸¹⁰ E.g. it is possible to deviate from the “loser pays” principle in antitrust damages claims in Germany if the financial situation of the claimant would otherwise impede him from bringing a meritorious action. See Section 89a of the Act Against Restraints of Competition.

need an effective collective action even in most of these cases in order to reduce the costs and risks of litigation, and make economies of scale possible.

Consequently, it can be assumed that the reason why collective actions have not been used is, at least partly, because in its existing form it is not perceived as an efficient redress mechanism among consumers, and that consumer associations either do not have incentives to pursue antitrust damages actions, or that they simply do not have the required expertise and resources. Finally, as in most jurisdictions only consumer and user associations and/or affected groups of consumers can bring a collective action for damages, competitors and other undertakings, which could have a better knowledge of the existence of competition infringements and of competition rules, are barred from bringing such an action. A common solution at EU level to make the enforcement of the Union right to damages effective is therefore required.

8.1.3 The Solution Proposed by the EU Legislator and its Main Flaws

The EU legislator intends to enhance antitrust damages actions by two means: the Directive on Antitrust Damages Actions, which provides for the harmonization or approximation of certain procedural rules governing antitrust damages actions, and a Recommendation on Collective Redress Mechanisms. It is submitted that although these instruments have some merit since they are likely to contribute to harmonizing or approximating certain issues that have created obstacles to private enforcement in the past, and will codify some principles of EU law which govern antitrust damages actions, many of the measures to be introduced are merely minimum harmonization measures, or mere recommendations. Thus, national divergences will remain in a number of areas, and it is debatable if these instruments will improve access to justice in particular for consumers who have been harmed by antitrust violations.

As to the Directive on Antitrust Damages Actions, its main contribution is that it provides for a minimum level of disclosure of evidence once the claimant has presented reasonably available facts and evidence showing the plausibility of its claim for damages,¹⁸¹¹ and minimum limitation periods for bringing antitrust damages actions both on a stand-alone or follow-on basis. In addition, it contains provisions regarding

¹⁸¹¹ Article 5 of the Directive on Antitrust Damages Actions.

the probative effect of infringements decisions of the NCAs, joint and several liability of infringers (including a right to contribution), the passing-on defense and quantification of harm, as well as provisions encouraging consensual dispute resolution.

The introduction of a minimum disclosure obligation of evidence is a very welcome legislative development considering the information asymmetry which generally exists between the infringers and victims of competition rules. Arguably, limited access to evidence is one of the biggest obstacles to bringing antitrust damages actions, and the possibility of requesting disclosure of such evidence should contribute to facilitating lodging damages claims, provided that other main obstacles (such as reducing the costs, and facilitating claims by consumers through collective redress mechanisms) are also adequately addressed.

However, the Directive still leaves issues that need to be addressed. One significant difficulty is that certain types of documents, namely leniency statements and settlement submissions, are entirely excluded from disclosure¹⁸¹² without any obligation to first conduct a proportionality test of whether they, or at least a part of the information contained in them, should be disclosed to the claimant in order to make the bringing of an antitrust damages action possible, especially when it would be impossible without access to some of that information. Instead, in line with the *Pfleiderer* Ruling,¹⁸¹³ it is suggested that national courts should genuinely be able to consider the implications both for public and private enforcement of granting or refusing a request of disclosure of evidence. In the current Directive the focus is rather on protecting public enforcement more than necessary at the cost of private enforcement. A more balanced approach would be called for in order to ensure that private enforcement could serve as an important complement to public enforcement, and not merely play a rather residual role.

Pursuant to the Directive on Antitrust Damages Actions, final infringement decisions by a national competition authority will have a probative effect, as far as the finding of an infringement is concerned, in subsequent damages actions, but only if they are brought

¹⁸¹² Article 6 of the Directive on Antitrust Damages Actions.

¹⁸¹³ See Judgment in *Pfleiderer* EU:C:2011:389, paragraph 30.

in the same Member State.¹⁸¹⁴ If the damages claim is brought before the courts of another Member State, the issue of the existence of an antitrust violation might have to be re-litigated, thus leading to a waste of time and resources, and increasing the costs of the action. Ultimately, this would however depend on the rules of the Member State in question as it may grant such binding effect under its national legislation.

In order to facilitate follow-on claims by consumers or consumer associations, it is submitted that final NCA and competition court decisions should also be given a presumptive binding effect in civil proceedings before the courts of other Member States. In turn, the defendant could be allowed to rebut this presumption if it would breach the requirements of fair trial, or the geographical scope of the infringement would make it irrelevant with regard to the damages claim in relation to the market in the Member State in which it is brought.¹⁸¹⁵ In addition, the presumption of binding effect could be rebutted if there were manifest errors of facts in the investigation.

The establishment of some common rules regarding limitation periods will in turn contribute to increased legal certainty. It should also facilitate the bringing of damages claims especially in Member States the limitation periods of which are currently very short.¹⁸¹⁶ The requirement that the victim must have knowledge of the infringement and the harm that it has caused him before the limitation period begins to run¹⁸¹⁷ is crucial as otherwise the limitation period might have expired even before the victim learned about the infringement. However, common guidelines should be provided on the criteria that should be assessed in order to determine whether the claimant had such knowledge, as it would otherwise result in uncertainty about the moment from which the limitation period starts to run. On the other hand, by only providing for minimum limitation periods, the Directive respects the principle of procedural autonomy. For situations not

¹⁸¹⁴ Article 9 of the Directive on Antitrust Damages Actions.

¹⁸¹⁵ See BASEDOW, J., “*Recognition of Foreign Decisions with the European Competition Network*” in BASEDOW, J., FRANCO, S. and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, 2012, p. 393-402, at p. 397 and 401-402.

¹⁸¹⁶ See CRAIG, L., JAZRAWI, W., GARTAGANI, S., SIAKKA T. AND FITZGERALD-FRAZER, K., “A summary of recent developments in antitrust damages claims, collective redress and funding in the EU and UK”, *G.C.L.R.*, Volume 6, No. 3, 2013, R41-R47, at R43.

¹⁸¹⁷ Article 10 of the Directive on Antitrust Damages Actions.

specifically regulated by the Directive, the limitation periods will have to respect the limits established by the principles of equivalence and effectiveness.

The Directive on Antitrust Damages Actions establishes that undertakings are jointly and severally liable for harm caused by their joint behavior.¹⁸¹⁸ However, an undertaking which has been granted immunity under a leniency program will be liable to injured parties other than its direct or indirect purchasers or providers only if they were unable to obtain full compensation from the other infringers. The provisions governing liability aim to restrict the liability of an undertaking which has been granted immunity, but can only do so to a limited extent since victims' right to full compensation must always be respected and, moreover, as the damages awarded are only single damages, the possibility of restricting the liability in damages is limited.

These provisions also make it possible for injured parties to choose to bring damages actions against the defendant most likely to be able to pay the compensation. From the claimants point of view this simplifies litigation as they could obtain compensation from one single defendant for the whole harm that they have suffered. The claimants do not have to be direct customers of the defendant, but in line with *ÖBB-Infrastruktur*,¹⁸¹⁹ as long as they can demonstrate that the defendant should have taken into regard that the anti-competitive conduct could result in the loss that the injured parties have suffered, the defendant could be held liable in civil damages. For the defendant this could result in uncertainty about whether it would be able to seek contribution from its co-infringers because some might have ceased to exist, and the costs of determining the relative responsibility of each co-infringer for the harm caused to injured victims could be high.¹⁸²⁰

According to the Directive on Antitrust Damages Actions, the passing-on defense is allowed, but the infringer has the burden of proof that the overcharge has been passed on.¹⁸²¹ The burden of proof relating to passing-on is different in cases involving indirect

¹⁸¹⁸ Article 11 of the Directive on Antitrust Damages Actions.

¹⁸¹⁹ See Judgment in *ÖBB-Infrastruktur*, EU:C:2014:1317, paragraph 37.

¹⁸²⁰ See HOWARD, A., "The draft Directive on competition law damages – what does it mean for infringers and victims?", *E.C.L.R.*, Volume 35, Issue 2, 2014, p. 51-55, at p. 54.

¹⁸²¹ Article 13 of the Directive on Antitrust Damages Actions.

purchasers claiming compensation for damages resulting from an overcharge which has wholly or partly been passed on to the claimant. Indirect purchasers must demonstrate both the existence of such pass-on, although reasonable requests for disclosure from the defendant and third parties will be allowed.¹⁸²² Allowing the passing-on defense could constitute an obstacle for antitrust damages actions, because indirect purchases and, especially consumers at the end of the distribution chain, will encounter large difficulties in proving the exact amount that has been passed on to them, particularly in situations involving several intermediaries. In order to mitigate the effects of a passing-on defense, arguably, consumers should have a possibility of joining forces in a collective or representative action in order to be able to share the litigation costs.

As to the quantification of harm, the Directive contains a rebuttable presumption of harm resulting from a cartel.¹⁸²³ The Commission has also issued guidelines on the quantification of harm in antitrust damages actions.¹⁸²⁴ Although they are not binding, it is still a positive development that the assessment of harm has been improved by giving a greater role to national judges, and making the involvement of competition authorities in the assessment of harm possible. This could at least somewhat facilitate the compensation especially of indirect purchasers which generally have the largest difficulties in proving the exact amount of harm that has been passed on to them.

But problems still remain. For instance, no common rules are provided for causation, remoteness or quantification of loss, so national divergences will prevail. Furthermore, the burden of proof and the standard of proof with regard to quantification of harm will largely be determined according to the national rules, which must respect the principles of equivalence and effectiveness. National courts will also have discretion to decide to which degree they will follow the non-binding guidelines for quantification of harm, so again the methods relied on may significantly vary from one Member State to

¹⁸²² Article 14(1) of the Directive on Antitrust Damages Actions.

¹⁸²³ Article 17 of the Directive on Antitrust Damages Actions.

¹⁸²⁴ See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *OJ C* 167, 13.6.2013, p. 19-21; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Articles 101 and 102 of the Treaty on the Functioning of the European Union Accompanying the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013.

another.¹⁸²⁵ It is also to be expected that economic evidence will prolong and make litigation more expensive.¹⁸²⁶

The aim of the Directive to encourage consensual dispute resolution could sometimes offer consumers, and maybe also SMEs, at least a possibility of obtaining some compensation since, without effective collective redress mechanisms, their current exercise of the right to compensation is limited in most Member States. However, given the advantageous provisions for settling co-infringers (e.g. suspension of antitrust damages proceedings, reduced liability for settling co-infringers, and limited contribution obligation), there could be a risk that the Directive would in practice rather result in increasing alternative dispute resolution at the cost of damages claims. This could be problematic because injured parties generally tend to be the weaker party, and there will not be equality of arms since the infringers tend to have access to most of the relevant evidence needed to prove the infringement and the extent of the damage.

Moreover, a number of issues have not been included in the Directive on Antitrust Damages Actions. For instance, it does not provide for collective redress, or contain rules regarding the fault requirement or costs of antitrust damages actions. Since the costs of damages actions often constitute a significant obstacle to bringing an antitrust damages claim, especially for consumers with small individual claims, some rules, or at least recommendations, concerning the cost rules would be needed. Similarly, a modification of the “loser pays” principle should be considered in line with Directive 2004/48/EC on the enforcement of intellectual property rights.¹⁸²⁷

Moreover, the prohibition of punitive or multiple damages at Union level should be reconsidered because it is contrary to existing EU law. Instead, its usefulness for certain types of antitrust violations, namely hard-core cartels, should be examined since it could lead to higher deterrence of the most harmful competition infringements.

¹⁸²⁵ See VANDENBORRE, I., HOFFMAN LENT, K. and GOETZ T.C., “Actions for antitrust damages in the European Union: evaluating the Commission’s Directive proposal”, *G.C.L.R.*, Volume 7, Issue 1, 2014, p. 1-9, at p. 5.

¹⁸²⁶ See HOWARD, A., “The draft Directive on competition law damages – what does it mean for infringers and victims?”, *E.C.L.R.*, Volume 35, Issue 2, 2014, p. 51-55, at p. 53.

¹⁸²⁷ This directive allows a derogation if the “loser pays” principle does not result in a fair outcome in the case.

The most noteworthy omission from the Directive on Antitrust Damages Actions is the lack of any kind of collective redress mechanism. Instead, the Commission has merely chosen to introduce non-binding recommendations on collective redress mechanisms.¹⁸²⁸ The Commission Recommendation on Collective Redress intends to establish some common principles both for injunctive collective redress and compensatory collective redress, concerning standing to bring a representative action, admissibility of such actions, information about collective actions, reimbursement of legal costs of the winning party, funding, and cross-border cases.¹⁸²⁹ Regarding specifically compensatory collective redress, the Commission has issued recommendations relating to the construction of the group based on the “opt-in” principle, collective ADR and settlements, legal representation and lawyers’ fees, punitive damages, funding, and collective follow-on actions.¹⁸³⁰ These are all important issues to consider in designing an optimal compensatory collective action but, arguably, the legal instrument chosen will fail to bring about a significant improvement of compensatory collective relief in a medium-term. Instead, a directive would be a more efficient legal instrument, since it imposes binding obligations on the Member States, while it still allows the respect of different legal traditions, and leaves Member States some choice as to the form of the measures to be implemented.

Admittedly, the Commission Recommendation also includes features which would be worth exploring in order to propose a binding EU legislative measure. For instance, the horizontal approach, and the possibility of applying both for collective injunctive and compensatory relief are to be welcomed as consumers often face difficulties also in bringing claims in other fields than competition law, such as general consumer claims or environmental claims. However, a binding instrument would be required in order to genuinely improve access to justice of consumers.

¹⁸²⁸ 2013/396/EU: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, *OJ L* 201, 26.07.2013, p. 60–65.

¹⁸²⁹ Part III of the Recommendation on Collective Redress Mechanisms.

¹⁸³⁰ Part V of the Recommendation on Collective Redress Mechanisms.

Moreover, the recommendations are not sufficiently extensive because the common principles laid down are generally based on encouraging a modest form of collective actions and conservative means of funding. One of the main problems of the existing collective redress mechanisms at national level is that they are commonly based on the “opt-in” principle, and the costs of the actions constitute as significant barrier for bringing antitrust damages actions. The *Football Shirts*¹⁸³¹ and *Mobile Cartel*¹⁸³² cases in the United Kingdom and France illustrate the limited efficiency of the “opt-in” model. The first case only resulted in the compensation of a small fraction of the injured parties, and the second case failed. Arguably, the only effective way of ensuring an “effective remedy” under Article 47(1) of the Charter of Fundamental Rights of the European Union for consumers would be to leave the decision of whether a collective redress action should be brought based on the “opt-in” or “opt-out” model to the courts, at least in cases involving numerous damages actions of low-value.

The Commission Recommendation is also too restrictive regarding contingency fees and alternative ways of funding collective actions. Since public funding is decreasing,¹⁸³³ there is a need to ensure sufficient funding of collective actions by introducing contingency fees in the EU (or by finding other alternatives) to fund collective actions. Provided that contingency fees are subject to judicial scrutiny or regulated in another effective manner, their possible negative effects can be reduced.¹⁸³⁴ Furthermore, by limiting the obligations of group members to pay the legal costs to the group representative and to those members who have *de facto* had an opportunity to exercise their right to opt out, the opt-out collective action should not generally pose any constitutional problems.

The issue of distribution of damages is also important especially in cases involving claimants at different levels in the distribution chain and, in particular, in collective actions. There would therefore be a need to decide on how damages which cannot be

¹⁸³¹ See Competition Appeal Tribunal, Notice of a claim for damages under section 47B of the Competition Act 1998, Case No: 1078/7/9/07.

¹⁸³² See <http://www.cartelmobile.org/>.

¹⁸³³ See HODGES, “Europeanization of civil justice: trends and issues” *C.J.Q.*, 26(JAN), 2007, p 96-123, at p. 99-100.

¹⁸³⁴ *Ibid.*, at p. 108.

distributed among the victims should be distributed. It is submitted that rules concerning *cy pres* distribution should be provided.

Other issues which have not been considered in a satisfactory manner include the coordination of public and private actions in a cross-border situation, and the jurisdictional rules. In those areas of law where a public authority can adopt a decision finding that there has been a violation of EU law, the national authority should be able to act as an *amicus curiae* in the collective redress action so as to not automatically prolong the collective redress proceedings or to impede stand-alone actions. This is justified especially in those cases where the decision by a national competition authority establishing an infringement does not assess whether the infringement has actually caused harm, since its file might be of limited value for proving the damage. Moreover, it would be necessary to ensure the coherent and uniform application of the EU antitrust rules when proceedings are brought before an NCA of one Member State and, simultaneously, an antitrust damages action is brought before a court of another Member State.¹⁸³⁵ In such cases, some have argued the *lis pendens* rule of Regulation 44/2001 could be modified to allow the court before which a collective redress action is brought to decline jurisdiction of the case if there is a more appropriate forum available which could deal more efficiently with the case.¹⁸³⁶ However, this may be difficult to achieve in practice.

Analyzing the potential implications of the Directive on Antitrust Damages Actions and the Commission Recommendation on Collective redress Mechanisms together, they are likely to only enhance private enforcement in a rather modest manner, and will generally fail to improve access to justice in particular for consumers. Therefore, more efficient legislative measures would be required in order to ensure the effective and uniform enforcement of the Union right to compensation for antitrust violations. Given that private enforcement plays a remarkably more significant role in the United States, and is also increasing in Canada, their experiences of private antitrust enforcement

¹⁸³⁵ See DANOVA, M. and BECKER, F., “*The Way Forward: A Strong Case for Reform at EU Level*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 407-420, at p. 416-417.

¹⁸³⁶ See DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M., BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 278-279.

could serve as valuable inspiration for how to enhance antitrust damages actions in the EU, without forgetting to consider the particularities of European legal systems and legal traditions.

8.1.4. Lessons to Learn from the U.S. and Canadian Experiences of Private Enforcement

In the United States, antitrust damages actions constitute over 90% of the private enforcement.¹⁸³⁷ This can be explained by the US civil procedure rules which provide additional incentives for bringing antitrust claims, such as treble damages and fee-shifting rules to the advantage of the plaintiff. Moreover, lawyers play an important role since virtually all class actions are brought on the basis of contingency fee arrangements.¹⁸³⁸ These features are likely to facilitate that complex, meritorious cases are also brought. However, in order to avoid possible abuse and to ensure a fair outcome for the class members, it is necessary to ascertain that class counsels' interests are closely aligned with those of class members.

In reducing the risks of collective actions, much could be learned from the U.S. and Canadian class actions. The U.S. class action is based on the "opt-out" principle which also allows bringing claims on behalf of unidentified class members. The advantage of this is that the class would normally be sufficiently large to make it worth bringing the action, even when the individual injuries of the class members would not be economically viable to be enforced individually. The drawback of the "opt-out" model is that individuals will be bound by the judgment or settlement resulting from the action if they have not opted out from the class in time. Another disadvantage from the defendant's point of view is that opt-outs reduce the finality of the settlement. However, the advantage is that the defendant will know the exact number of potential remaining claims.¹⁸³⁹

¹⁸³⁷ See LANDE, R.H., "Benefits of private enforcement: empirical background" in FOER, A.A. and CUNEO, J.C. (eds.), *The International Handbook of Private Enforcement of Competition Law*, Edward Elgar, Cheltenham UK – Northampton, MA, 2010, p. 3-11, at p. 4.

¹⁸³⁸ See SITTENREICH, "The rocky path for private Directors General: Procedure, politics, and the uncertain future of EU antitrust damages actions", *Fordham L. Rev.*, 78 April, 2010, p. 2701, at p. 2735.

¹⁸³⁹ See BUSCHKIN, I.T., "The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts", *Cornell Law Review*, 90, September, 2005, p. 1563-1600, at p. 1577-1582.

Similarly, in Canada, the introduction of class actions has led to antitrust damages actions being brought more frequently. Ontario and a few other jurisdictions¹⁸⁴⁰ have opt-out class actions, whereas e.g. British Columbia has a combination of “opt-out” and “opt-in” regimes: opt-outs apply to residents, while non-residents are subject to the “opt-in” principle. Moreover, generous contingency fees can be awarded in order to ensure access to justice.¹⁸⁴¹ Both in the United States and Canada settlement agreements have to be approved by a court and must be fair, reasonable and in the best interest of the class.¹⁸⁴²

Nevertheless, in the EU, opt-out collective actions, and especially the U.S class action, have traditionally been viewed with skepticism. Arguably, this resistance against class actions in Europe is partly based on ignorance about the U.S.-style class action. Other features of the U.S. civil procedure, such as jury-trials and treble damages, which are possible, but not necessary, in class actions are also often perceived as an inherent part of the class action. For instance, treble damages are also automatically awarded for a successful individual antitrust damages action, and are not a special feature of the class action.¹⁸⁴³ Furthermore, abuses of the class action device mainly occur in other fields of law, while the complexity and uncertainty in the outcome of antitrust class actions tend to limit the abuses.¹⁸⁴⁴ In fact, the American Antitrust Institute has even found that there is no evidence of frivolous antitrust settlements. On the contrary, claimants sometimes settle strong cases for too little, not the opposite.¹⁸⁴⁵ In addition, the Class Action Fairness Act of 2005 has further reduced the risks of abuses, for example by providing that lawyers’ fees should be aligned with the awards made to class members in coupon settlement cases.¹⁸⁴⁶

¹⁸⁴⁰ These jurisdictions include Alberta, Manitoba, Saskatchewan, and Nova Scotia.

¹⁸⁴¹ See FACEY, B.A. and ROSNER, D., “Collective Redress for Cartel Damages in Canada” in LOWE, P. and MARQUIS, M. (eds.), *European Competition Law Annual: 2011 Integrating Public and Private Enforcement of Competition Law – Implications for Courts and Agencies*, Hart Publishing, Oxford and Portland, Oregon, 2014, p. 205-234, at p. 223.

¹⁸⁴² See Sec. 3(e) of the CAFA, 28 USC § 1712.

¹⁸⁴³ See TARUFFO, M., “Some Remarks on Group Litigation in Comparative Perspective”, *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 414.

¹⁸⁴⁴ See SCHNELL, G., “Class Action Madness in Europe – a Call for a More Balanced Debate”, *E.C.L.R.*, Volume 28, Issue 11, 2007, p. 617-619, at p. 618.

¹⁸⁴⁵ See AMERICAN ANTITRUST INSTITUTE, “*The Next Antitrust Agenda: The American Antitrust Institute’s Transition Report on Competition policy to the 44th President of the United States*”.

¹⁸⁴⁶ Sec. 3(a) of the CAFA, 28 USC § 1712.

Given that certain Canadian provinces have chosen the opt-out model, but this has not led to any reported abuse of the class actions proceedings, and the number of class actions has been reasonable thanks to the scrutiny of courts,¹⁸⁴⁷ there is no reason for completely ruling out opt-out collective actions in the EU. On the contrary, there is a need for opt-out collective actions in cases where the individual claims would be too small to be enforced individually. In such situations, the constitutional right of access to justice would be better guaranteed in the “opt-out model”. Although the “opt-in” model will ensure to a higher degree that an individual will not participate in litigation against his will, the possibility of all individuals enforcing their rights in such cases is, in practice, limited,¹⁸⁴⁸ and will not necessarily comply with Article 47 of the Charter of Fundamental Rights of the European Union.

In the light of the U.S. and Canadian experiences, it can be concluded that class actions are a valuable tool for private antitrust enforcement. Consequently, the EU should consider introducing a similar device that would, however, be adapted to the specificities of the EU legal systems. It would be likely to mainly increase follow-on actions, but could also be useful in stand-alone cases regarding abuses of a dominant position and vertical restraints.

8.2. The Way Forward

The recent legislative instruments adopted by the European Union in order to enhance private enforcement are a step in the right direction, although they fall short of facilitating access to justice in particular for consumers. However, these instruments could serve as a basis for a future directive on collective actions in mass harm situations and for facilitating antitrust damages claims by modifying and improving the current provisions.

It is submitted that the main required modifications to the Directive on Antitrust Damages Actions include ensuring the balance between public and private enforcement

¹⁸⁴⁷ See MULHERON, R., “Some differences with Group Litigation Orders – and why a class action is superior”, *C.J.Q.*, 24(JAN), 2005, p. 40-68, at p. 64-65.

¹⁸⁴⁸ See TARUFFO, M., “Some Remarks on Group Litigation in Comparative Perspective”, *Duke Journal of Comparative and International Law*, 11, Spring/Summer 2001, p. 405-421, at p. 413.

to a greater extent regarding the access to evidence, and coordinating public enforcement actions in one Member State with damages claims brought in another Member State in a more efficient way. The limitation periods for bringing antitrust damages claims should also be further specified. Most importantly, a binding EU-wide collective action should be introduced for cross-border cases, and the courts should be able to decide on a case-by-case basis whether it should be brought based on the “opt-in” or “opt-out” principle. The issue of distribution of damages, as well as the types of damages available would also require further elaboration. In addition, the cost rules and the rules applicable to funding of antitrust damages actions, both individual and collective actions, should be overhauled.

Regarding access to evidence, no category of documents should be excluded as such from the disclosure obligation, but the Directive should allow national courts to conduct a proportionality test of the request for disclosure, and consider the implications of disclosure for both public and private enforcement in line with the *Pfleiderer* Ruling.¹⁸⁴⁹ In a majority of cases, leniency statements would most likely still be afforded protection – and thus this provision would not unduly reduce the effectiveness of public enforcement – but exceptionally claimants which would otherwise not be able to bring a meritorious antitrust damages action, would be granted access to such statements or to part of the information contained in them.

As to the coordination of public and private enforcement actions in different Member States, it is suggested that the final infringement decision of another NCA should at least constitute a rebuttable presumption for the existence of an antitrust violation in civil proceedings before the courts of another Member State. The defendant could challenge this presumption, for instance, by showing a breach of the right to fair trial or a manifest error of facts in the investigation.¹⁸⁵⁰ Moreover, in order to avoid conflicting decisions, the NCAs should, at the discretion of the national court, be allowed to participate as *amicus curiae* before the courts of another Member States, for example by submitting statements.

¹⁸⁴⁹ See Judgment in *Pfleiderer*, EU:C:2011:389.

¹⁸⁵⁰ See BASEDOW, J., “*Recognition of Foreign Decisions within the European Competition Network*” in BASEDOW, J., FRANCO, S. and IDOT, L. (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart Publishing, Oxford and Portland Oregon, 2012, p. 393-402, at p. 397 and 401-402.

The limitation periods for bringing antitrust damages claims should also be further specified. Since there has been uncertainty in some Member States regarding the moment from which the claimant is considered to have had knowledge about the antitrust violation and the harm that it has caused it,¹⁸⁵¹ some guidelines should be provided on what criteria courts would have to assess in order to determine this issue.

With regard to collective actions, the introduction of both representative and collective actions would be appropriate. It is crucial that actions can also be brought by individuals in order to ensure to a higher degree that a redress mechanism is also available to victims when representative bodies, due to priority reasons or other reasons, decide not to bring an action. However, an “opt-out” model should at least be available for low-value claims in order to ensure access to justice, and an effective remedy compliant with Article 47 of the EU Charter of Fundamental Rights. Courts should be able to decide at the certification stage whether the collective action should be brought based on the “opt-in” or “opt-out” principle on a case-by-case basis. Arguably, in certain cases it could be justified to certify subgroups on different grounds, for instance by applying the “opt-in” requirement to non-resident group members, and the “opt-out” principles to residents. This should usually allow for ensuring the sufficient size of the group in order to merit the action, while it would avoid that non-resident group members would be bound by a judgment against their will.

Guidance should also be provided on criteria to take into account in assessing whether the interests of the group members are adequately protected. In particular in cross-border collective actions, the court seized with the case should ensure that the requirements of procedural fairness (such as adequate notice) are met, and it should also assess whether it is the most appropriate forum to deal with the action. If another court would be able to deal more efficiently with the case, the court seized of the collective redress action should be allowed to decline jurisdiction over the case.¹⁸⁵²

¹⁸⁵¹ For example, due to difficulty in determining this exact moment, Finland decided to abolish the requirement about knowledge in its new Competition Act. *See* However, such a solution seems unsatisfactory, since in some cases the injured party might only learn about the infringement once the limitation period has expired.

¹⁸⁵² *See* DANOVA, M., FAIRGRIEVE, D., and HOWELLS, G., “*Collective Redress Antitrust Proceedings: How to Close the Enforcement Gap and Provide Redress for Consumers*” in DANOVA, M.,

Most importantly, the EU-wide collective action for cross-border cases should be introduced by a directive in order to enhance access to justice. The directive should also regulate the distribution of damages, and the allocation of costs between group members. Although the main objective should be full compensation of the harm, unclaimed damages could be allocated on *cy pres* basis, or go to a fund for financing future collective damages claims. Sufficient safeguards, such as limiting the obligation to reimburse costs to the group representatives, have to be put in place to avoid that group members which have genuinely not been able to opt out in time will not have to pay any adverse costs.

Stronger incentives for bringing damages claims would be, nevertheless, needed in meritorious cases, but the outcome of which is uncertain because of their high complexity. As representative bodies might prefer to use their (limited) financial resources on cases that they estimate that they can win, there might be a certain need for lawyers specializing in bringing complex antitrust damages actions. Some incentives, such as contingency fees, might need to be developed in order to foster such a specialization, although these fees should be subject to judicial approval in order to avoid abuses. Because the lawyers' fees would depend on the success of the claim, they would have a strong incentive only to accept cases that are likely to succeed.¹⁸⁵³ Also other ways of alternative funding, for instance by third-party finance institutions should be possible, provided that possible conflicts of interest are eliminated, and the amount of the damages should be subject to court approval in order to ensure a fair outcome for the group.

Moreover, courts should be able to adjust the “loser pays” rule in line with Directive 2004/48/EC in order to encourage that damages claims are being brought. Courts could also be allowed to cap costs and adjust litigation costs by limiting them to what is considered reasonable and proportionate.¹⁸⁵⁴ In addition, any reference to punitive

BECKER, F., and BEAUMONT, P. (eds.), *Cross-border Competition Law Actions*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 253-288, at p. 278-279.

¹⁸⁵³ See LESKINEN, C. “Collective Actions: Rethinking Funding and National Cost Rules”, *The Competition Law Review*, Volume 8(1), 2011, p. 87-121.

¹⁸⁵⁴ *Ibid.*, at p. 107.

damages being prohibited should be eliminated as the Court of Justice has held that they are not contrary to EU law.¹⁸⁵⁵

In addition, the Commission should provide some guidelines on causation, remoteness and foreseeability in order to facilitate the assessment of damages. These issues, as well as the burden of proof and standard of proof for the quantification of harm, are determined according to national rules, and therefore give rise to divergences. Regarding the quantification of harm, although the issuing of practical guidelines was justified as a first step taking into account that the type and scope of damage will depend on the particular antitrust violation, and should be assessed on a case-by-case basis, it should be considered in light of the experience of the Member States, whether some binding minimum standards would also be called for at EU level.

As regards the choice of the implementation model for the collective action device, the horizontal approach adopted by the current Commission Recommendation merits further consideration. There is a need for an EU-wide collective action for damages based on a mass harm situation in which rights granted under Union law have been infringed. A directive would appear as the most appropriate legal instrument by allowing respecting the legal traditions and cultural differences of the Member States, and also to solve constitutional problems in the most suitable manner while, at the same time, providing for sufficient uniformity. But whatever solution will finally be chosen, it should be possible to be effectively applied in practice.

An EU collective action could be adopted under Article 81(2)(f) TFEU, which allows the elimination of obstacles to the proper functioning of civil proceedings by promoting the compatibility of the rules on civil procedures applicable in the Member States when this is necessary in order to ensure the proper functioning of the internal market. This legal basis would be justified by the necessity to ensure the effective enforcement of the substantive rights granted to individuals and companies under EU law, and the same protection of those rights across the EU. This would, in turn, avoid competitive advantages for companies established in Member States where it is difficult for consumers to enforce their rights. The introduction of an EU collective action would

¹⁸⁵⁵ See Judgment in *Manfredi*, EU:C:2006:461, paragraph 93.

also enhance access to justice in cross-border situations since currently it is impossible in some Member States for consumer organizations to bring collective actions on behalf of consumers who are non-nationals.¹⁸⁵⁶

Alternatively, a sector-specific collective action could be provided for antitrust damages cases, which could later be expanded to other fields in which mass harm has been caused. This option could be appropriate in case it is difficult to find sufficient support for a binding horizontal EU collective action, and if there are doubts about the need for such an action in other fields. Regarding antitrust damages actions, the need for an efficient collective access has already been demonstrated, since currently consumers seldom obtain compensation for the harm that they have suffered. The legal basis for a directive introducing a collective antitrust damages action would arguably be the same as for the Directive on Antitrust Damages Actions, i.e. it could be based on Articles 103 and 114 TFEU.

Furthermore, in the past few years a number of Member States have introduced collective actions, so it would seem that there is a certain political will for improving collective redress and enhancing access to justice. Thus, it would be a question of negotiating the details of the collective action design, for which the current Commission Recommendation could serve as a starting point. The ideal moment for doing this would be in 2016 when the Commission will assess the implementation of its Recommendation on Collective Redress. At least the issues outlined above should all be addressed in order to make the collective redress mechanism more effective.

8.3. Final Remarks

The analysis of the current state of private enforcement in the EU has shown that although there has been an increase in antitrust damages actions during the past 5-10 years, such actions are mainly brought by undertakings, and often on the basis of a contractual relationship.¹⁸⁵⁷ In addition, many damages claims are believed to be

¹⁸⁵⁶ For instance, in France, only consumers associations which represent consumers at a national level may bring a representative action on behalf of consumers who have been injured as a result of the actions of the same professional. Article L.422-1 of the Consumer Code.

¹⁸⁵⁷ See AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012, Conference on September 15th, 2012 at LSE, London, available at <http://www.clcpecreu.co.uk/pdf/ConferenceReport.pdf>.

settled.¹⁸⁵⁸ Damages actions brought “as a sword” are generally less frequent and, what is more concerning, very few damages claims are brought by consumers. Moreover, precisely consumers appear to lack access to justice in the form of effective collective redress mechanisms for antitrust violations.

A number of obstacles to bringing antitrust damages claims still remain in the Member States, and there is still a significant divergence of the national procedural and tort rules applicable to such actions. Divergent rules and standards apply, for instance, to access to evidence, the form of collective redress mechanisms available, and funding of damages claims. Antitrust damages actions are also mainly concentrated to seven Member States, in particular Germany, the Netherlands, and the United Kingdom, whereas private enforcement in the form of damages claims is rather negligent in other Member States.¹⁸⁵⁹

Until recently, private enforcement in the EU has mainly been enhanced through the case law of the Court of Justice. The court has created a Union right to damages for antitrust violations,¹⁸⁶⁰ and has clarified the scope of standing to bring antitrust damages actions.¹⁸⁶¹ It has also laid down some principles for reconciling public and private enforcement with regard to access to leniency statements.¹⁸⁶² However, the recent legislative instruments adopted by the European Union seem to aim to limit the effects of this case law by giving a clear preference for public enforcement.¹⁸⁶³ Moreover, they result in a much more modest harmonization of the national procedural rules governing antitrust damages actions than what was initially envisaged during the legislative process.¹⁸⁶⁴ Most notably, instead of introducing an EU-wide collective action, the Commission merely recommends Member States to provide for representative and

¹⁸⁵⁸ See RODGER, B.J., AHRC Project, “*Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-2012. UK Report*”, at p. 42.

¹⁸⁵⁹ See Commission Staff Working Paper SWD(2013) 204, Impact Assessment Report on Damages actions for breach of the EU antitrust rules accompanying the proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013, at p. 19.

¹⁸⁶⁰ Judgment in *Courage*, C-453/99, EU:C:2001:465.

¹⁸⁶¹ Judgment in *Manfredi* ECLI:EU:C:2006:461.

¹⁸⁶² Judgment in *Pfleiderer*, C-360/09, EU:C:2011:389.

¹⁸⁶³ Article 6(6) of the Directive on Antitrust Damages Actions.

¹⁸⁶⁴ See e.g. the Failed Draft Directive.

collective actions.¹⁸⁶⁵ Arguably, the common rules provided for antitrust damages actions, which are mostly minimum harmonization measures, are likely to principally enhance undertakings possibilities of bringing damages claims in the form of follow-on actions based on a Commission decision, or a final decision of the NCA in their own Member State.

Consumers, on the other hand, are expected to be the big losers of this reform. They will continue to struggle with limited possibilities of proving the harm that they have suffered as well as high costs and risks of litigation. Their limited opportunities of obtaining compensation undermines the aim to ensure full compensation, and to create a level-playing field for antitrust damages actions and remove obstacles to the proper functioning of the internal market. In fact, consumers in Member States which facilitate the bringing of effective collective actions would be more likely to obtain compensation and, as a result, undertakings established in such Member States would face a greater risk of civil liability for competition law infringements.

This does not signify that competition law enforcement in the EU should be private-enforcement driven, but it should be a credible and useful complement to public enforcement. The primary goal of private enforcement should also be compensation of the harm resulting from antitrust violations, but it is clear that any obligation to pay damages will also have a potential deterrent effect on undertakings. Both effective public and private enforcement is thus needed in order to ensure compliance with the EU competition rules, but the new directive falls short of achieving this. It is a missed opportunity to significantly improve access to justice for victims of antitrust violations, and it fails to ensure the fundamental right to an effective remedy under Article 47 of the EU Charter of Fundamental Rights, especially for consumers. The EU should therefore attempt to address this by a more far-reaching overhaul of the rules governing antitrust damages actions, in line with what has been suggested in this thesis, at the latest in 2020 when the Directive has to be reviewed.¹⁸⁶⁶

¹⁸⁶⁵ Commission Recommendation on Collective Redress Mechanisms.

¹⁸⁶⁶ Regarding collective redress mechanisms in general, the review will already take place earlier and the possibility of introducing an EU collective actions for damages should be taken into consideration in that review.

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ENGLISH SUMMARY

The main objective of this thesis is to establish what measures would be required to ensure the effective private enforcement of antitrust rules in the EU, and to suggest how they should be implemented. As the law stands today (before the implementation of the Directive on Antitrust Damages Actions), the relevant national procedural rules are very divergent, and these procedural divergences increase the risk of differences in treatment and lead to legal uncertainty as it is more difficult for the victims and defendants to foresee the outcome of an action. Moreover, the low number of antitrust damages actions that have been brought to date in the EU in particular by consumers suggests that the current system of private enforcement is not working satisfactorily.

Thus, the first objective of the thesis is to establish what procedural rules would need to be modified in order to remedy the current under-enforcement of antitrust rules through private actions. Therefore, the first part of the thesis aims to analyze the existing obstacles to private enforcement in the EU in general and then in the United Kingdom, Germany, France, Spain, Sweden and Finland, in particular.

This thesis also aims to establish that although the primary goal of private enforcement should be compensation of the harm resulting from antitrust violations, any obligation to pay damages will also have a potential deterrent effect on undertakings. Both effective public and private enforcement is thus needed in order to ensure compliance with the EU antitrust rules.

The second objective is to analyze the recent EU legislative instruments to enhance private enforcement: the Directive on Antitrust Damages Actions and the Recommendation on Collective Redress Mechanisms. The purpose is to demonstrate the flaws and limitations of the reform, and to determine the additional issues that would also require a harmonization or approximation.

Given that private enforcement of antitrust rules plays a remarkably more significant role in the United States, and is also increasing in Canada, the third objective of the thesis is to examine especially what lessons could be learned from the U.S. and Canadian experiences of private antitrust enforcement. In particular, the focus will be on

the role of class actions, contingency fees, and discovery in strengthening private enforcement since these features are distinctive of the private enforcement model in the United States and in Canada.

The last objective of the thesis is to establish the optimal way of improving private enforcement. Hence, the final part of the thesis will focus on what issues must be regulated in a uniform way in addition to those included in the Directive on Antitrust Damages Actions, and how the harmonization of these rules should be implemented.

The thesis concludes that a number of obstacles to bringing antitrust damages claims still remain in the Member States, and there is still a significant divergence of the national procedural and tort rules applicable to such actions. Divergent rules and standards apply, for instance, to access to evidence, the form of collective redress mechanisms available, and funding of damages claims. Antitrust damages actions are also mainly concentrated to seven Member States, in particular Germany, the Netherlands, and the United Kingdom, whereas private enforcement in the form of damages claims is rather negligent in other Member States.

The analysis of the current state of private enforcement in the EU has also shown that although there has been an increase in antitrust damages actions during the past 5-10 years, such actions are mainly brought by undertakings, and often on the basis of a contractual relationship. In addition, many damages claims are believed to be settled. Damages actions brought “as a sword” are generally less frequent and, what is more concerning, very few damages claims are brought by consumers. Moreover, precisely consumers appear to lack access to justice in the form of effective collective redress mechanisms for antitrust violations.

Until recently, private enforcement in the EU has mainly been enhanced through the case law of the Court of Justice. The court has created a Union right to damages for antitrust violations, and has clarified the scope of standing to bring antitrust damages actions. It has also laid down some principles for reconciling public and private enforcement with regard to access to leniency statements. However, the recent legislative instruments adopted by the European Union (i.e. the Directive on Antitrust Damages Actions and the Recommendation on Collective Redress Mechanisms) seem

to aim to limit the effects of this case law by giving a clear preference for public enforcement. Moreover, they result in a much more modest harmonization of the national procedural rules governing antitrust damages actions than what was initially envisaged during the legislative process. Most notably, instead of introducing an EU-wide collective action, the Commission merely recommends Member States to provide for representative and collective actions. Arguably, the common rules provided for antitrust damages actions, which are mostly minimum harmonization measures, are likely to principally enhance undertakings possibilities of bringing damages claims in the form of follow-on actions based on a Commission decision, or a final decision of the NCA in their own Member State.

Consumers, on the other hand, are expected to be the big losers of this reform. They will continue to struggle with limited possibilities of proving the harm that they have suffered as well as high costs and risks of litigation. Their limited opportunities of obtaining compensation undermines the aim to ensure full compensation, and to create a level-playing field for antitrust damages actions and remove obstacles to the proper functioning of the internal market. In fact, consumers in Member States which facilitate the bringing of effective collective actions would be more likely to obtain compensation and, as a result, undertakings established in such Member States would face a greater risk of civil liability for competition law infringements.

The thesis concludes that in order to incentivize antitrust damages actions and to facilitate the right to compensation above all for consumers, it would be necessary to introduce class actions and some other forms of procedural devices available in the U.S. and Canadian legal systems, once they have been adapted to the European legal systems and traditions.

For instance, the introduction of both representative and collective actions would be appropriate. An “opt-out” model should at least be available for low-value claims in order to ensure access to justice, and an effective remedy compliant with Article 47 of the EU Charter of Fundamental Rights. Courts should be able to decide on a case-by-case basis at the certification stage whether the collective action should be brought based on the “opt-in” or “opt-out” principle.

The EU-wide collective action for cross-border cases should be introduced by a directive in order to enhance access to justice. The directive should also regulate the distribution of damages, and the allocation of costs between group members. Although the main objective should be full compensation of the harm, unclaimed damages could be allocated on *cy pres* basis, or go to a fund for financing future collective damages claims. Sufficient safeguards, such as limiting the obligation to reimburse costs to the group representatives, have to be put in place to avoid that group members which have genuinely not been able to opt out in time will not have to pay any adverse costs.

Stronger incentives for bringing damages claims would also be needed in meritorious cases the outcome of which is uncertain because of their high complexity. As representative bodies might prefer to use their (limited) financial resources on cases that they estimate that they can win, there might be a certain need for lawyers specializing in bringing complex antitrust damages actions. Some incentives, such as contingency fees, might need to be developed in order to foster such a specialization, although these fees should be subject to judicial approval in order to avoid abuses. Because the lawyers' fees would depend on the success of the claim, they would have a strong incentive only to accept cases that are likely to succeed. Also other ways of alternative funding, for instance by third-party finance institutions, should be possible, provided that possible conflicts of interest are eliminated, and the amount of damages is subject to court approval in order to ensure a fair outcome for the group.

Moreover, courts should be able to adjust the “loser pays” rule in line with Directive 2004/48/EC in order to encourage that damages claims are being brought. Courts could also be allowed to cap costs and adjust litigation costs by limiting them to what is considered reasonable and proportionate.

As regards the choice of the implementation model for the collective action device, the thesis finds that the horizontal approach adopted by the current Commission Recommendation on Collective Redress Mechanisms merits further consideration. There is a need for an EU-wide collective action for damages based on a mass harm situation in which rights granted under Union law have been infringed. A directive would appear as the most appropriate legal instrument by allowing the respect of the legal traditions and cultural differences of the Member States, and the solution of

constitutional problems in the most suitable manner while, at the same time, providing for sufficient uniformity. But whatever solution will be chosen, it should be possible to apply it effectively in practice.

In short, this thesis demonstrates that the new Directive on Antitrust Damages Actions is a missed opportunity to improve access to justice in cases involving infringements of the EU competition rules, and the common rules proposed will not be sufficient to ensure the effective and uniform enforcement of the Union right to compensation for infringements of Articles 101 and 102 TFEU. In particular, the Directive will do little to improve redress for consumers, the ultimate victims of antitrust violations. The EU should therefore attempt to address this by a more far-reaching overhaul of the rules governing antitrust damages actions, in line with what has been suggested in this thesis, at the latest in 2020 when the Directive has to be reviewed.